No. 89-38

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GUARDIAN PLANS, INC. *et al.*,

Petitioners,

v.

JOSEPH W. TEAGUE, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether Virginia may, consistent with the First Amendment, impose a content-based prohibition on only one type of commercial telephone solicitation absent any justification for so discriminating against the speech singled out for regulation or any showing that the banned speech is harmful.

(2) Is Virginia's law unconstitutionally vague?

RULE 28.1 LIST

Guardian Plans, Inc., is a wholly-owned subsidiary of Service Corporation International, a publicly-owned corporation that has a financial interest in the outcome of this proceeding.

PARTIES

Petitioners (plaintiffs below):

Guardian Plans, Inc.
Benny R. Benson
Willard D. Tharp
Ben E. Rogers, Jr.

Respondents (defendants below):

Members, Virginia Board of Funeral Directors & Embalmers:
Joseph W. Teague
Frederick R. M. Carter
David M. Farris
Emogene Bennett
Donald K. Jones
Ernest L. Myers
John Harvey Givens
David L. Bailey, Jr.
Susan Modlin

Bernard L. Henderson, Jr., Director, Virginia Department of Health Regulatory Boards

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is printed in Petitioners' Appendix at pages A-1 - 20. It is reported at 870 F.2d 123 (4th Cir. 1989).

Much of the analysis applied by the Fourth Circuit in Petitioners' case is articulated in a companion case: *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989) (upholding a West Virginia law prohibiting pre-need funeral solicitation). This opinion ("*Rockefeller*") is printed in Petitioners' Appendix at pages C-1 - 19.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 7, 1989. Petitioners' Petition for Rehearing was denied on April 12, 1989.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix Page

United States Constitution

First Amendment E-1

Virginia Statutes

Va. Code § 54-260.74(2) (1950), as amended E-2

This law purportedly prohibits all pre-need funeral solicitation.

Virginia Regulations

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These regulations prohibit all pre-need funeral solicitation.

STATEMENT OF THE CASE

Introduction

Petitioners Tharp and Rogers are Virginia funeral service licensees.[1] They wish to telephone potential consumers and set up appointments to discuss what are called "pre-need funeral plans."[2] Pre-need funeral planning involves making funeral arrangements before death has occurred or is impending. If such advance planning is not undertaken, the inevitable alternative is "at-need funeral planning" — plans made after death has occurred or while it is imminent.[3]

Virginia law explicitly allows pre-need funeral planning. See Code of Virginia (1950), as amended, §§ 11-24 to 29 ("Va. Code"). The Federal Trade Commission and major consumer groups favor such pre-need funeral planning because it allows consumers to make unhurried and unemotional decisions. It is universally recognized that consumers who wait until the time of need are extremely vulnerable to fraud and overreaching.[4]

Every other Virginia salesman and professional is allowed to engage in solicitation by telephone in Virginia, subject to Virginia's consumer protection laws. Ironically, Virginia law even permits telephone solicitation for the sale of cemetery plots. However, as interpreted and enforced by the Respondent Virginia Board of Funeral Directors & Embalmers ("Board"), a Virginia statute and its accompanying regulation *totally prohibit* funeral directors from making such telephone calls. *See* Va. Code § 54-260.74(2) (Appendix at E-2, *et seq.*) ("anti-solicitation law").

Simply put, a funeral director — or any other professional or salesman — can call anyone in the state and sell anything from pots and pans, encyclopedias and cemetery plots to (if he is properly licensed)

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[1]Because Virginia has a single license for both funeral directors and embalmers, holders of the license are called "funeral service licensees."

[2]Tharp and Rogers would not do any selling over the telephone. They would merely set up appointments.

[3]It is important at the outset to differentiate funerals from other goods or services. In some solicitation cases, the concern is whether a consumer will be coerced into buying something he does not need. Funerals are different — everyone will eventually require a funeral. The only question is *when* a consumer will make his decision — pre-need (when a consumer can consider, comparison shop and later change his plans) or at-need (when, as the undisputed evidence indicates, the consumer is at his most vulnerable). Every consumer kept in the dark by a state ban on pre-need solicitation burdens his heirs with the obligation to make funeral plans at the time of need.

[4]The Amicus Briefs filed by the American Cemetery Association and the Southern Cemetary Association discuss the pro-consumer aspects of pre-need funeral planning.

insurance, stocks and bonds or even legal services. But if the conversation turns to pre-need funeral plans — even those made many years in advance — the funeral director has committed a crime.

The author of the Fourth Circuit's majority opinion found Virginia's anti-solicitation law to be constitutional under the analysis articulated by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). However, the Fourth Circuit did not require Virginia to demonstrate: (1) how the state's purported interest in residential privacy could justify this specific ban on *one* type of telephone call bearing one particular message; or (2) that any fraud or overreaching had occurred or might occur in connection with pre-need funeral solicitation.

The majority's opinion — and that of at least one other Circuit Court — reflects a confusion in applying the rulings of this Court as to the evidentiary burden a state must meet in justifying a restriction on truthful commercial speech. This Court's recent decision in *Board of Trustees v. Fox*, No. 87-2013 (June 29, 1989), did not address this critical point, and Petitioners respectfully submit that this Court should take the opportunity to provide guidance.

The Fourth Circuit also found that Virginia's anti-solicitation law was not unconstitutionally vague, although: (1) on its face the law does not apply to pre-need solicitation by funeral service licensees; (2) the Board's Rule 30(b)(6) designee testified that it would take a "fortune-teller" to know what the law meant; and (3) Respondent Virginia Funeral Directors Association — the largest group of those who must obey the law — took the official position that the law means exactly the opposite of what the Board says it means.[5]

Petitioners respectfully submit that this case raises the following important issues justifying this Court's consideration:

(1) What factors are used in determining if a restriction on commercial speech is content-based or content-neutral?

(2) What evidence must a state present to justify a content-based prohibition on truthful commercial speech?

(3) To what extent does the First Amendment protect telemarketing, which is an increasingly common means of disseminating commercial information, but which this Court has never addressed?

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[5]Virginia has recently enacted a pre-need solicitation ban that is clearer than the old law. However, Petitioners presumably are still subject to prosecution under the old law.

(4) How do the First Amendment principles governing lawyer solicitation or door-to-door charitable solicitation apply to this form of marketing?

Virginia's Anti-solicitation Law

First Amendment Issues

Virginia's ban on funeral solicitation was enacted 38 years ago. *See* Judge Butzner's Dissent, Appendix at A-12. At that time, nearly everyone made funeral plans at the time of need. However, as pre-need planning has become increasingly popular, the interpretation of the solicitation ban has been expanded to cover solicitation for pre-need planning as well.

Whatever the law's original justification, the record in this case contains undisputed evidence that the continued application of the solicitation ban to pre-need planning has an *anticompetitive* purpose and effect. Starting in 1983, the Board undertook an extensive review of its regulations. In March 1985, the Board *unanimously* voted to *permit* pre-need funeral solicitation. The Board's designated spokesman admitted the obvious — that the Board "considered the [proposed] change to be in the interest of the public."

In voting to permit pre-need funeral solicitation, the Board concurred in a nearly unanimous modern trend. The Federal Trade Commission has recently reiterated its position that pre-need planning allows consumers greater freedom of choice, and that a total ban on pre-need solicitation "may unnecessarily restrict the dissemination of information about pre-need funeral arrangements to willing and competent buyers."[6] Regional offices of the Federal Trade Commission's Bureaus of Competition, Consumer Protection and Economics have also explicitly supported pre-need *telephone* solicitation.[7] The American Association

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[6] November 23, 1988, letter from Federal Trade Commission to the Honorable Steny H. Hoyer at 3 (contrasting pre-need solicitation and at-need solicitation, which a state might be justified in completely prohibiting). See also February 9, 1989, letter from Federal Trade Commission to the Honorable Franklin P. Hall (Member, House of Delegates, General Assembly of Virginia) at 3-4 (noting that restrictions on telephonic pre-need solicitation may be anticompetitive and harm consumers).

These and other Federal Trade Commission letters are discussed in the Amicus Briefs filed by the American Cemetery Association and the Southern Cemetary Association.

[7] Telephone solicitation is a well established business practice that is widely used to sell goods and services in many markets. In the funeral industry, it may be an efficient, cost effective method by which pre-need

(Continued on next page.)

of Retired Persons ("AARP") Model Funeral Law permits pre-need telephone solicitation because it increases consumers' knowledge and funeral planning options, and helps protect consumers from the inevitable alternative — at-need funeral planning in an emotionally vulnerable condition.[8]

The FTC and AARP positions are important, not only because they rebut any purported state interest in prohibiting pre-need telephone solicitation, but also because they highlight the vigorous public debate now being undertaken in several states on this issue.

The Board's 1985 unanimous attempt to permit pre-need funeral solicitation was short-lived. Virginia's funeral directors pressured the Virginia Board into abandoning its reform effort. As the Board's long-time Executive Secretary explained, the funeral directors believed that permitting pre-need solicitation would have placed them

> in a position where they felt that if they were to maintain a viable business they would have to *compete* with the others.

(emphasis added).

Later in 1985, the Board tried again — voting to recommend that the state law be amended to permit pre-need solicitation. Again, the funeral directors pressured the Board into abandoning its legislative efforts. According to the Executive Secretary, the funeral directors preferred "*not to compete with one another* by solicitation" (emphasis added).

No one disputed the Executive Secretary's testimony. At the close of evidence, the trial judge referred to Virginia's funeral law as a "protect the good old boys' statute."

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[7] *(Continued from previous page.)* sellers may impart to consumers truthful and valuable information about the broad range of pre-need purchasing options that are available. It may also be a useful means for pre-need sellers to schedule sales consultations with interested consumers at the consumers' convenience. Because this method of solicitation does not involve direct, face-to-face contact between the seller and the potential buyer, it would appear to pose minimal risks of coercion, harassment, or similar abuses.

May 9, 1986, letter from William C. MacLeod (Director of the FTC Chicago Regional Office) to the Illinois Department of Registration and Education. Accord May 31, 1985, letter from Timothy J. Muris, Director of the FTC Bureau of Competition to Illinois Senator Judy Baar Topinka (Fourth Circuit App. Tab 33 at 588-589).

[8] A Model Law for Prepaid Funeral Arrangements (Fourth Circuit App. Tab 32 at 574).

In contrast to this evidence that Virginia's anti-solicitation law is based on anticompetitive goals rather than consumer protection, there was *no* credible evidence that telemarketing solicitation of pre-need funeral plans has or might coerce or harass consumers, or that existing consumer protection laws would not adequately protect buyers of pre-need funeral contracts. After hearing all of the evidence, the trial judge concluded, "I am not impressed with the [State's] concern about fraud."

This should have come as no surprise, since common sense would indicate that consumers planning a funeral in advance (without the time pressure and emotional trauma of the at-need situation) are no different from consumers making decisions about buying any other good or service.

Vagueness of Virginia's Anti-solicitation Law[9]

Petitioners Tharp and Rogers sought to determine the meaning of Va. Code § 54-260.74(2) (Appendix at E-2-3). On its face, the law (recited verbatim and discussed below at 17-18) does not prohibit what Petitioners Tharp and Rogers want to do.

Moreover, the Board's Rule 30(b)(6) designee testified in deposition that the ban applied *only* if the context and content of the telephone solicitation made it illegal. He specifically denied that the state followed a *per se* approach under which all pre-need solicitation was illegal.

When asked how a funeral director would know whether he was committing a crime by engaging in pre-need solicitation, the designee answered succinctly: "*He would have to employ a fortune-teller.*"

The State followed this "rule of reason" approach in its initial pleadings, arguing that the purported ban applied only if the "context and content" of the telephone call were improper.

However, the long-time Executive Secretary of the Board testified that it had *always* taken the position that such pre-need telephone solicitation was *per se* illegal. In fact, he realized that the Board's Rule 30(b)(6) designee had testified incorrectly, and he worried that he "did not want to place [himself] in some form of perjury" with the designee.

At trial, the State repudiated its own designee and pleadings, and adopted the *per se* ban as its "official" position.

Respondent Virginia Funeral Directors Association ("VFDA") took the position that "state law does *not* prohibit the solicitation of

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[9]Virginia has recently enacted a pre-need solicitation ban that is clearer than the old law. However, Petitioners presumably are still subject to prosecution under the old law.

pre-need funeral contracts." Thus, the largest group of those who must obey the law believes that it means *exactly the opposite* of what the enforcing authority — the Virginia Board — thinks it means.

Fourth Circuit Decision

Circuit Court Judge Hall and District Court Judge Kiser, over Judge Butzner's dissent, held that Virginia's anti-solicitation law did not violate the First Amendment, but they were unable to agree upon a common ground of analysis.

Much of the Court's analysis was articulated in the companion case of National Funeral Services, Inc. v. Rockefeller, 870 F.2d 136 (4th Cir. 1989), which upheld a new West Virginia law prohibiting pre-need funeral solicitation (see Appendix at C-1, *et seq.*). In *Guardian*, Judge Hall (writing for the majority) and Judge Butzner (in dissent) agreed that Virginia's anti-solicitation law was content-based because it related only to the discussion of pre-need funeral planning and to no other good or service. Judge Kiser (a District Judge sitting by designation) disagreed, contending that the anti-solicitation law was a content-neutral "time, place and manner" restriction.

Both Judges Hall and Butzner applied the test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S 557 (1980), although arriving at different conclusions as to the Virginia ban's constitutionality. Judge Hall held that Virginia's anti-solicitation law passed constitutional muster without requiring Virginia to present any evidence supporting any of the four *Central Hudson* tests.

The majority also held that Virginia's anti-solicitation law was not unconstitutionally vague.

BASIS FOR FEDERAL JURISDICTION BELOW

The District Court had jurisdiction over this case under 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. First Amendment

A. *Introduction*

The Court below held that the First Amendment permits a state to completely ban, on the basis of content, a most effective means of communicating completely truthful commercial information about a valuable service, absent any justification for subjecting the particular

form of speech to such differential treatment or any showing that the banned speech is in any way harmful.

In so holding, the Fourth Circuit decided an issue of fundamental importance in a way that directly conflicts with the decisions of this Court. However, the Fourth Circuit is not alone. Apparently confused by perceived inconsistencies in this Court's precedent, at least one other Circuit Court has similarly ruled that regulation of one type of commercial speech need not be supported by any explanation or evidence that the speech so singled out is either harmful or distinguishable from unregulated speech transmitted through the same means. Review of the Fourth Circuit's decision is therefore critical to resolve confusion among the lower courts and prevent further erosion of the First Amendment's protection for commercial speech.

Specifically, the Fourth Circuit's failure to require that a state support its content-based regulation with something other than conclusory assertions will permit a return to precisely the sort of paternalistic and heavy-handed regulation of commercial speech rejected by this Court's modern cases. This is particularly true in light of the Court's recent decision that the state may regulate commercial speech through other than the least restrictive means. *Board of Trustees v. Fox*, No. 87-2013 (June 29, 1989). As the *Fox* decision itself indicated, it is essential that the state be required to "affirmatively establish" that the "government goal [is] substantial" and the "cost [is] carefully calculated" in order to insure that courts are not "overly permissive" in upholding state restrictions on commercial speech. *Id.*, Slip op. at 10.

Indeed, last term the Court noted probable jurisdiction in *Oring v. California State Bar*, No. 87-1224 (appeal dismissed Jan. 23, 1989), to resolve precisely this question of whether the state may presume, or must establish, that certain types of speech are inherently harmful. However, *Oring* was dismissed for want of a properly presented federal question. *Guardian* thus presents an appropriate vehicle for resolving the issue left undecided there. Such further guidance is particularly needed in this context, since several states have adopted or are considering prohibitions on pre-need funeral solicitation.

B. The Fourth Circuit Majority Misapplied the *Central Hudson* Test in a Way that Ignored this Court's Precedent and Creates a Split Among the Circuits

This Court has adopted a four-part analysis for assessing restrictions on commercial speech. The Court must examine: (1) whether the commercial speech concerns lawful activities and is not misleading; (2)

whether the government interest involved is substantial; (3) whether regulation directly advances the governmental interest asserted; and (4) whether the regulation is narrowly tailored to achieve the desired objective. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980). *See also Board of Trustees v. Fox*, No. 87-2013, Slip op. at 10 (June 29, 1989).

Significantly, the Fourth Circuit did not mention any interests Virginia hoped to advance with its anti-solicitation law. *See Guardian*, Appendix at A7-8. Instead, the Fourth Circuit merely referred to its companion decision in *Rockefeller*. There, *West Virginia* attempted to justify its very different pre-need solicitation prohibition on two state interests — privacy and consumer protection.

Petitioners respectfully submit that the Fourth Circuit's upholding of the Virginia anti-solicitation law in the total absence of any articulated state interests represents a serious misapplication of the *Central Hudson* test. But even assuming that Virginia shares West Virginia's interests in privacy and consumer protection, the Fourth Circuit's decision is still seriously flawed.

Although the author of the majority opinion in Rockefeller purported to apply the *Central Hudson* analysis, he unquestioningly accepted state interests that were either facially inapposite or based on nothing more than the state's — and the court's — wholly speculative concerns about the subject matter of funerals planned in advance.

1. *Privacy*

One of the state interests cited by the Fourth Circuit in upholding West Virginia's anti-solicitation ban was residential privacy. However, the Court's reliance on this interest was not only unjustified, it followed another Circuit in substantially weakening the protections for commercial speech provided in this Court's *Central Hudson* analysis.

It is important to emphasize at the outset that Virginia's prohibition is content-based because Virginia allows telephone solicitation for every type of commercial transaction, including even the sale of cemetery plots, *except* funeral plans. *See Linmark Assocs. v. Willingboro Township*, 431 U.S. 85, 94 (1977) (finding that restrictions on residential "For Sale" signs "proscribed particular types of signs based on their content because it fears their 'primary' effect"); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (statute prohibiting licensed pharmacists from advertising prescription drugs "single[d] out speech of a particular content"); *Bolger v. Youngs Drug*

Prods. Corp., 463 U.S. 60, 67-68 (1983) (restrictions on sending contraceptive information through the mails is content-based).

Although one judge in the panel majority below acknowledged the content-based nature of this restriction, he utterly failed to recognize how this affected the nature and scope of the interests Virginia could permissibly advance in support of this restriction. Specifically, Judge Hall held that Virginia could rely on the general interests allegedly furthered by a uniform ban on telemarketing — protecting the privacy of the home from intrusive telephone calls and eliminating the possibility of fraud — even though *only* telemarketing relating to funeral plans has been prohibited.[10]

It is well established, however, that if a content-based regulation of commercial speech "is to be sustained, it must be on the basis of the [state's] *interest in regulating the content of the communication and not on any interest in regulating the form.*" *Linmark Assocs. v. Willingboro Township*, 431 U.S. 85, 94 (1977) (emphasis added). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Since Virginia has not banned telemarketing generally, it cannot rely on the perceived problems caused by *the form* of this communication to justify its restriction. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Linmark Assocs. v. Willingboro Township*, 431 U.S. 85 (1977); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Cf. *Schad v. Mount Ephraim*, 452 U.S. 61, 73 (1981) ("the [government] presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems of this

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[10]Judge Kiser, the other Judge forming the majority below, in mistaken reliance on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), concluded that Virginia's prohibition was content-neutral. In *Renton*, this Court upheld regulation of adult theatres on the basis of "detailed findings" about the "secondary effects" of adult theatres and record evidence establishing that the legislature's "predominate" intent was to combat these effects. Unlike in *Renton*, however, the funeral services provided here are obviously not harmful to the health and welfare of society. Accordingly, "[t]he . . . regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech." *Boos v. Barry*, 108 S. Ct. 1157, 1163 (1988). "Regulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' we referred to in *Renton*." *Id.* Accordingly, since the regulation here is content-based, Judge Kiser's further conclusion that it can be upheld because it does not bar other channels of communication is not tenable. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69-70 n.18 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980).

nature more significant than those associated with various permitted uses"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (Oklahoma's selective regulation of liquor advertising "suggest limits on the substantiality of the interest it asserts").

Accordingly, Virginia cannot maintain any plausible, let alone substantial, interest in protecting homeowners' privacy against the unwanted telephone calls it permits with respect to all other activities or services.[11] Failure to comprehensively prohibit telemarketing also disables Virginia from justifying its regulation on the grounds that it has a heightened interest in barring this form of communication because it is *inherently* misleading or subject to irremediable fraud and abuse. Rather, Virginia must show that it has an interest in prohibiting pre-need telemarketing for funeral services because that activity imposes a harm distinct from telemarketing related to other products or services allowed by Virginia law (including, for instance, telemarketing for the sale of cemetery plots).

The Fourth Circuit's flawed reliance on residential privacy as justifying Virginia's specific pre-need solicitation ban not only ignores this Court's rulings, it also exacerbates a split among the Circuit Courts.

Notwithstanding the directives of this Court on this issue, the Fourth Circuit is not alone in accepting such "under-inclusive" regulation on the basis of justifications applicable only to all-inclusive regulation. In *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988), the Seventh Circuit upheld a prohibition against solicitation through the mail that applied solely to real estate agents, stating that it would not "second-guess the Illinois General Assembly and hold the statute unconstitutional merely because we may believe that Illinois could have prohibited more expressive conduct in an effort to achieve its stated purposes." 840 F.2d at 1303. Like the Fourth Circuit in *Guardian*, the Seventh Circuit thus approved a content-based limit on commercial speech in the face of *Linmark* and other decisions of this Court requiring that content-based restrictions be justified on the basis of their content.

Further review by this Court is clearly warranted because of the need for a uniform federal rule, and the clear potential for the Fourth and Seventh Circuits' holdings to swallow up commercial

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[11] In all events, solicitation over the phone is clearly less intrusive and poses less potential for fraudulent coercion than does in-person solicitation. As the dissenting judge below correctly noted, "[c]oercion can be avoided by simply hanging up the phone." Appendix at A-14. Moreover, the telephone solicitation does not involve any direct sales, it simply sets up future appointments at the person's home.

speech protections by authorizing discriminatory treatment of a particular type of speech on the basis of the most paternalistic or crass political reasons.

2. *Consumer Protection*

As explained above, the Fourth Circuit majority did not cite *any* state interest in justifying Virginia's pre-need solicitation ban. However, in *Rockefeller* it upheld West Virginia's solicitation ban on the additional ground of consumer protection. In *neither* case did the Fourth Circuit majority require the state to justify its content-based restriction with any evidence that consumers had been or might be harmed.

As with privacy, therefore, the Fourth Circuit's analysis of this supposed interest reflects confusion about the state's burden of justifying commercial speech restrictions. *Guardian* thus directly presents the question of the quantum and type of factual support the government needs to produce in support of commercial speech regulation — an issue that is of fundamental importance in demarking the permissible bounds of a state's restrictions, and one that has engendered confusion among the lower courts.

This Court has repeatedly stated that a government must show that its restriction on commercial speech advances its articulated interests. The justification must clearly be more than a legislature's *ipsi dixit* finding. In the recent case of *Sable Communications v. F.C.C.*, No. 88-515 (June 23, 1989), for instance, this Court declined to defer to Congress' "conclusory statements" about the purpose of restrictions, reiterating that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Slip op. at 13, citing *Landmark Communications, Inc. v. Commonwealth*, 435 U.S. 829, 843 (1978). And in *Board of Trustees v. Fox*, No. 87-2013 (June 29, 1989), this Court again held that:

> since the State bears the burden of justifying its restrictions . . . it must affirmatively establish the reasonable fit we require.

Slip op. at 10. *See also Linmark Assocs. v. Willingboro Township*, 431 U.S. 85, 95 (1977); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985); *Central Hudson*, 447 U.S. at 569.

Moreover, this Court has held that "isolated abuses or mistakes" could not "justify a total ban on [a] mode of protected commercial speech." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. ___, 108 S. Ct. 1916, 1923 (1988). *Accord In re R.M.J.*, 455 U.S. 191, 203 (1982)

(overturning Missouri's "absolute prohibition" on certain types of solicitation based on its "potentially misleading" nature).

At the same time, this Court has stated that if it is "self-evident" that certain types of speech are inherently misleading or otherwise contrary to the asserted interest, restrictions need not be supported by detailed findings. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652-53 (1985). If the focus of the restriction is not the speech itself, but the conduct that the speech encourages, this Court has held that the state is not obligated to establish with scientific proof that commercial speech has the purpose and effect of providing such encouragement. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986). Of course, if the conduct at issue is not harmful (as in *Guardian*), then the state must make some showing of intrinsic harm in the speech itself.

In other situations, this Court has held that the nature and context of certain transactions provide such an obvious threat of coercive activity that they may be regulated without a showing of particularized harm in the individual case. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). Of course, the *Ohralik* decision is inextricably linked to what this Court recognizes as the unique status of lawyers and the heightened demands of the legal profession. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. ____, 108 S. Ct. 1916, 1930 (1988) (O'Connor, J., dissenting).[12]

There is the very real danger that Circuit Courts have failed to appreciate the exceptional factual circumstances that generated this Court's decisions in such cases as *Ohralik, supra*, and *Posadas, supra*, and have blindly applied the holdings in those cases to avoid the careful analysis required by *Central Hudson*.

For instance, *Posadas* has been interpreted by a number of commentators as substantially relaxing — if not eliminating — the government's factual burden in justifying restrictions.[13]

Most Circuit Courts have generally followed this Court's rulings (albeit pursuant to differing formulations of the evidentiary burden.

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[12]This Court has disagreed of late over whether these unique attributes of the legal profession require re-thinking the First Amendment protections afforded attorneys' commercial communications. However that issue is ultimately resolved, the important point is that the rules crafted for attorneys because of their distinct status cannot be permitted to rachet down, by facile analogy, the First Amendment protections afforded commercial speech the state has no comparable interest in regulating.

[13]*See, e.g.*, Kurland, "Posadas de Puerto Rico v. Tourism Co., Etc.," 1986 *Sup. Ct. Rev.* 1, 7; Rotunda, "The Constitutional Future of the Bill of Rights. . . ," 65 N.C. L. Rev. 917 (1987); Richards, "Clearing the Air About Cigarettes: Will Advertisers' Rights Go Up in Smoke?" 19 Pac. L. J. 1 (1987).

For instance, in *Project 80's, Inc. v. City of Pocatello*, 857 F.2d 592, 596 (9th Cir. 1988), the court overturned a content-neutral solicitation ban because, among other things, there was "*no showing* that door-to-door solicitation has resulted in overreaching" and "*little in the record*" to show that the restriction directly advances the state's interests (emphasis added). Similarly, in *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1257 (3d Cir. 1986), *cert. denied sub nom.*, 479 U.S. 1103 (1987), the Third Circuit held that any "legislative judgment [about the need for restrictions on commercial speech] is not accorded the *per se* validity that the district court applied here, and legislative findings *unsupported by the evidence may be overturned*" (emphasis added). *Accord S.D.J., Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988), *cert. denied sub nom.*, ____ U.S. ____, 109 S. Ct. 1310 (1989) ("we insist upon *objective evidence* of [the state's] purpose — a study or findings" (emphasis added)).

However, at least one lower court has — like the Fourth Circuit in *Guardian* — accepted a state's conclusory assertions in upholding a content-based ban on commercial speech. In *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988), the Seventh Circuit refused to examine the factual under-pinnings of a content-based restriction, stating, "especially when factual issues determine the constitutionality of governmental action, a federal court may not use its own findings to upset plausible state decisions." *Id.* at 1303-1304.

The majority's decision in *Guardian* represents a departure from this Court's rulings and — along with the Seventh Circuit's approach in *Curtis* — creates a serious risk that the First Amendment protections for commercial speech will be seriously eroded.

An analysis of the Fourth Circuit majority's "consumer protection" justification reveals how this flawed approach can damage the First Amendment.

As evidenced by the fact that Virginia "permits telemarketing of other legitimate products and services," it is clear that "[t]elemarketing is not *inherently* fraudulent or coercive" — it depends on what is said. Judge Butzner's Dissent (Appendix at A-14) (emphasis added). Accordingly, in order to justify its prohibition, the state must identify something about pre-need funeral plans that renders telemarketing in this context more susceptible to the fraudulent practices the state purportedly wants to prevent. The court below believed the difference was that funerals are an emotional subject and thus create "a serious threat of fraud and overreaching." *Id.*, Appendix at C-15.

It is plain, however, that restrictions on commercial speech cannot be supported by such unsubstantiated and counter-intuitive speculation.

First, this view ignored the factual finding of the trial judge, who concluded — after hearing all of the evidence — that "I am not impressed with the [State's] concern about fraud."

Second, while it may be reasonable to assume that a person who has recently lost a loved one will be particularly vulnerable to fraudulent practices, there is absolutely no basis for assuming that — *before death has occurred or is impending* — consumers will make a less intelligent choice concerning funeral services than they will about any other service. To the contrary, permitting telemarketing prior to death helps *prevent* such abuses because it facilitates consumers in calmly making a choice about available funeral options *before* they (or their family) are in a vulnerable position and have little time or interest in making a more informed decision.[14] For this reason, the Virginia Board itself, like the Federal Trade Commission Bureaus and major consumer groups, twice unanimously decided that permitting pre-need solicitation would serve the public interest (see page 3-4, *supra*).

In any event, the lower court's view that "death is different" utterly fails to distinguish a number of other telemarketing practices that Virginia freely permits. As mentioned above, Virginia law *permits* solicitation by sellers of cemetery plots. Likewise, it cannot be assumed that discussing pre-need funeral plans creates a greater risk of deceptive coercion than telephone solicitation involving life insurance or a host of other services related to serious accidents or disease. Surely the state is required to provide *some* explanation as to why — if it truly believes consumers are disabled from making rational decisions concerning their own mortality — it has failed to provide similar restrictions on these services. In short, "[t]he [state] has presented no evidence, and it is not immediately apparent as a matter of experience, that [pre-need funeral telemarketing] poses problems . . . more significant than those associated with various permitted uses." *Schad v. Mount Ephraim*, 452 U.S. 61, 73 (1981).

Most fundamentally, however, the court below committed the basic constitutional error of simply assuming, without any factual support, that the challenged regulation directly advanced Virginia's asserted interest in preventing fraud.

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[14]Judge Hall's reference in *Rockefeller* to the FTC funeral rule (Appendix at C-4) is ironic. The quoted portion is immediately followed by an explanation of how *at-need* consumers are vulnerable to overreaching. Precisely because of this phenomena, the FTC and others have vigorously *favored* pre-need telephone solicitation as protecting consumers from such tactics (see above).

In this case, there were *no* legislative findings, *no* administrative findings, and *no* credible evidence that telemarketing solicitation of pre-need funeral contracts coerces or harasses consumers,[15] or that existing consumer protection laws would not adequately protect buyers of pre-need funeral plans. There were not even the "conclusory statements" found inadequate in *Sable*, or the "isolated abuses or mistakes" found inadequate in *Shapero*. After hearing the evidence, the trial judge stated, "I am not impressed with the concern about fraud."

In fact, as explained above, the undisputed evidence is that the ban on pre-need telephone solicitation has an *anticompetitive* purpose and effect.[16] The trial judge called the Virginia funeral law a "protect the good old boys' statute."

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[15]It is not necessary to rely on conjecture to determine the effect of such telemarketing.

For a number of years, Petitioner Guardian Plans, Inc., engaged in telemarketing under the GUARDIAN PLAN® program (under which licensed life insurance agents such as Petitioner Benson visited consumers' homes to discuss pre-need funeral plans funded by life insurance policies or annuities). Given the anti-solicitation law's vagueness, Virginia did not threaten criminal prosecution for this telemarketing until fairly recently (arguing that funeral service licensees with whom Guardian had a contractual relationship were somehow violating the solicitation ban). Thus, there is an historical record showing whether telemarketing is inherently fraudulent or overreaching.

The record is clear. In the many years that GUARDIAN PLAN representatives have placed thousands of telephone calls to Virginia consumers, the state received exactly *one* complaint — and even that one complaint did not allege fraud or overreaching.

And an extensive criminal investigation of Petitioners' activities failed to uncover *any* consumer complaints. This investigation was initiated by complaints from *other funeral directors*, not from consumers.

[16]Although the Board's aborted attempts to permit pre-need funeral solicitation should demonstrate beyond doubt that Virginia's funeral laws have an anticompetitive purpose and effect, there are additional grounds for this conclusion.

For instance, anyone who merely wishes to discuss or make pre-need funeral arrangements must be a full funeral service licensee.

Thus, a licensed insurance agent such as Petitioner Benson who would like to discuss the cost of funeral plans with consumers must first attend two years of mortuary school, be an apprentice at a funeral home for two years, arrange 25 funerals and embalm 25 bodies with his own hands. He must then pass a detailed test asking technical questions on such topics as anatomy, chemistry, bacteriology, pathology, public health, embalming and what is euphemistically called "restorative art" — the technique of making dead people look alive.

Such an insurance agent could then set up an office at which he could discuss the cost of funeral plans with his customers. But his office would have to have a *completely furnished embalming room*.

(Continued on next page.)

Moreover, Virginia's telemarketing ban only prohibits setting up appointments at a consumer's home. A funeral director can legally visit a consumer's home if the consumer invites him. The undisputed evidence is that any fraud or overreaching would occur in this meeting — *not* during the telemarketing.

Although Virginia argued that consumers who initiate contacts with funeral directors are less likely to be coerced or defrauded, there was no record support for such a supposition. More fundamentally:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is.

State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976). This condemned principle is precisely the approach accepted by the Fourth Circuit in *Guardian*.

In light of all this, it is clear that the majority's opinion rests only on the out-dated and paternalistic notion that consumers should be "protect[ed]" from truthful information about "extremely sensitive" subjects such as funerals. See Appendix at C-10.

However, this Court has repeatedly rejected the "highly paternalistic" notion that government may "restric[t] the free flow of truthful information . . . [because] a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.' " *Linmark Assocs. v. Willingboro Township*, 431 U.S. 85, 95-96 (1977). *Accord Metromedia v. City of San Diego*, 453 U.S. 490, 505 (1981) ("a State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon . . . its recipients"); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) ("It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us").

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[16]*(Continued from previous page.)*

Like the anti-solicitation law which purposely discourages pre-need funeral planning and dooms consumers to the "at-need" vulnerability upon which some funeral directors may prey, this license requirement is a transparent attempt to restrict competition.

Ironically, an insurance agent can sell insurance or annuities to cover retirement, costs of a college education or the value of a key manager to a company, and discuss all aspects relevant to the insured's needs — but the agent cannot discuss with the insured his goals in planning a funeral.

Moreover, this Court has articulated this principle in cases where the restrictions furthered governmental interests far more robust than those present here — which the record shows to be largely if not wholly designed to protect entrenched business interests rather than consumers. *See Linmark*, 431 U.S. at 94-96 (regulation served "important governmental objective" of "promoting stable, racially integrated housing"); *State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 766 (regulation promoted "strong interest" in maintaining "professionalism on the part of licensed pharmacists"); *Central Hudson*, 447 U.S. at 569 (regulation serves state interest of conserving energy during nationwide energy shortage).

Thus, just as in the Seventh Circuit decision of *Curtis v. Thompson*, the Fourth Circuit in *Guardian* returned to the paternalistic concept that consumers must be protected from truthful information. And along with the Seventh Circuit, the Fourth Circuit now apparently will simply take at face value any articulated state interest without holding it up to analysis under common sense or an evidentiary record.

Resolution of these issues would eliminate the split among the Circuits and send a clear signal that government need do more than make bare assertions to suppress commercial speech.

It is, after all, this insistence on proof by the government that, at bottom, distinguishes modern commercial speech doctrine from what went before. Only the requirement that the state establish its justification through evidence can protect the First Amendment. The legislature, or its counsel, can always produce some marginally plausible explanation as to why a restriction protects vulnerable consumers from "extremely sensitive" topics. Judge Hall, Appendix at C-10. As the decision below reflects, acceptance of this standard by the Fourth Circuit will do much to return to a paternalistic form of regulation. This Court has not tolerated such practices in the past and should not do so now.

II. *Vagueness*[17]

The vagueness issue in this case is really an extension of the First Amendment issues, since laws carrying criminal penalties for the expression of speech receive heightened scrutiny. *Keeffe v. Library of Congress*,

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[17]As explained above, the law under which Petitioners' prosecution is being considered has been replaced with a clearer statute.

588 F. Supp. 778, 789 (D.D.C. 1984), *aff'd* in relevant part, 777 F.2d 1573 (D.C. Cir. 1985).[18]

There are three ways to determine if a law is unconstitutionally vague: (1) examine the law; (2) question those who enforce it; and (3) question those who must obey it. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974).

First, Virginia's pre-need solicitation ban is vague on its face. The Fourth Circuit majority held that the "plain language" of two subsections of the law clearly prohibit pre-need solicitation.

> (d) Employment by the licensee of persons known as 'cappers,' or 'steerers,' or 'solicitors,' or other such persons to obtain the services of a holder of a license for the practice of funeral service;
>
> (e) Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment . . . .

Va. Code § 54-260.74(2) (see Appendix at E-2). However, even a cursory reading of these sections demonstrates that they simply do not apply to a funeral director engaging in pre-need telemarketing. Tharp and Rogers do not wish to "employ" anyone to call customers — they will do so themselves. See Judge Butzner's Dissent, Appendix at A-9. This facial vagueness is particularly significant because the Fourth Circuit eschewed the obvious option of narrowly construing the statute to avoid a constitutional issue.

Second, it is beyond dispute that those who enforce Virginia's anti-solicitation law have no idea what it means. The State's designated spokesman testified that it would take a "fortune-teller" to discern the law's meaning. Of course, this uncertainty creates just the sort of situation condemned by this Court — one in which a government employee decides on an *ad hoc* and subjective basis who is a criminal and who is

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[18] *See Riley v. National Fed'n of the Blind*, 487 U.S. ____, 108 S. Ct. 1006 (1988); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (striking down municipal ordinance governing pornography as unconstitutionally vague); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (holding that the standards of vagueness "are especially stringent, and an even greater degree of specificity is required, where . . . the exercise of First Amendment rights may be chilled by a law of uncertain meaning"). *Accord Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

not. *See Kingsley Int'l Pictures Corp. v. Regents of NYU*, 360 U.S. 684, 694 (1959); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

The State's Rule 30(b)(6) designee adopted the position appearing in the State's pleadings — that pre-need telephone solicitation was merely a "questionable" practice that was illegal only in certain contexts. However, the Board's Executive Secretary worried that the spokesman might have committed "perjury." Thus, at trial the State abandoned its own pleadings and its designated spokesman and argued that the law applied a *per se* ban on pre-need solicitation.

Third, those who must obey the law have no idea what it means. The VFDA, Virginia's largest funeral director association, thinks the law means exactly *the opposite* of what the Board thinks it means, arguing that "state law does not prohibit the solicitation of pre-need funeral contracts."

If this law is not vague, then no law is vague.[19]

CONCLUSION

Petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to permit review of its opinion and judgment, and then to reverse the judgment below and enter judgment for Petitioners.

Respectfully submitted,

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Dated: July 11, 1989

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[19]The Fourth Circuit's conclusion that Virginia's anti-solicitation law passes constitutional muster apparently rests on a 1988 Virginia General Assembly joint resolution and a statement in Petitioners' early pleadings. As Judge Butzner pointed out, such a resolution is not only irrelevant legally, but takes a much broader view of the law than the State now asserts (Judge Butzner's Dissent, Appendix at A-12). Petitioners concede that they have also been confused about the law's meaning — the statement Judge Hall cites was filed before the depositions revealed the State's chameleon-like position on the law's meaning.

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GUARDIAN PLANS INC., *et al.*,
Plaintiffs-Appellants,

v.

Joseph W. TEAGUE, *et al.*
Defendants-Appellees.

No. 88-3101
United States Court of Appeals,
Fourth Circuit
March 7, 1989

Before HALL, Circuit Judge, BUTZNER, Senior Circuit Judge, and KISER, United States District Judge for the Western District of Virginia, sitting by designation.

K.K. HALL, Circuit Judge:

Guardian Plans, Inc., a Virginia corporation, and Benny R. Benson, its agent (collectively referred to as "Guardian"), along with Willard D. Tharp and Ben E. Rogers, Jr., two Funeral Directors licensed by the Commonwealth of Virginia, appeal the district court's decision upholding the constitutionality of the licensure requirements and the telephone solicitation restrictions of Virginia's funeral laws. We affirm.

I.

Guardian markets the Guardian Plan ("plan"), an insurance-funded prearranged funeral program. Under the plan, a client arranges his funeral by selecting certain funeral goods and services with the assistance of one of Guardian's salespersons, none of whom are trained in the funeral service profession. A salesperson then calculates the cost of the prearranged funeral and sells the client a life insurance policy, the proceeds of which are sufficient to pay for the funeral. The client then revocably assigns the death benefit to Guardian, which then makes arrangement with a participating funeral home that will eventually provide the goods and services.

Upon the death of the client, the family must consent to the release of the policy proceeds to a funeral home. For its part, a funeral home agrees to provide the promised services regardless of whether their cost exceeds the policy proceeds. By the terms of the agreement, if the

proceeds exceed the cost of the funeral, the surplus is refunded to the client's survivors.

In Virginia, Guardian promotes this plan through regular media advertising, targeted direct mailings, and telemarketing. In particular, its telemarketing is done as a follow-up on households that do not respond to its direct mailings. Calls are placed to these households to attempt to persuade potential clients to agree to an in-home sales visit. No sales of the plan are done over the phone.

In May, 1985, the Virginia Board of Funeral Directors and Embalmers ("Board"), the regulatory authority of the funeral service profession, became aware of Guardian's solicitation practices, which it believed were contrary to state law. In May, 1987, the Board instigated an investigation into the solicitation practices of a number of funeral homes that participated in the plan. Among those funeral homes investigated were those operated by appellants Tharp and Rogers. Upon learning of the investigation, Guardian entered into negotiations with the Board in an attempt to settle this dispute. When these negotiations failed, Guardian filed this suit.

In this action, Guardian sought declaratory relief that Virginia's funeral profession license requirement was unconstitutional, and injunctive relief against its enforcement. Joining in the action were Tharp and Rogers, who also challenged the statute's telephone solicitation restrictions.[1] Later, the Virginia Funeral Director's Association, Inc., intervened on behalf of the license requirement.

The case proceeded to a two-day bench trial. In a ruling from the bench, the district court upheld the statute in all respects. This appeal followed.

II.

Appellants challenge Virginia's funeral service profession regulation in several respects. First, all of the appellants contend that Virginia's licensure requirement is unconstitutionally vague. Alternatively, they argue that if the statute is not vague, its requirement that all licensed funeral professionals graduate from a mortuary school and serve a two-year apprenticeship, is so stringent that it cannot withstand due

[1] All of the parties agree that Virginia law also bans in-person solicitation by funeral service professionals. Va. Code § 54.260.74(2). However, appellants do not seek to engage in this type of solicitation and, consequently, have not challenged the ban's constitutionality.

process/equal protection scrutiny.[2] Appellants Tharp and Rogers also contest the statute's solicitation provisions. They argue that a fair reading of the statute demonstrates that it is unconstitutionally vague and not intended to address preneed solicitation. They also contend that even if the statute is not vague and does apply to preneed solicitation, it cannot ban telemarketing because to do so would run afoul of the first amendment's protection of commercial speech. We address these claims seriatim.

Under Virginia's regulatory scheme, the Board determines the qualifications for a person to engage in the funeral service profession. Va. Code § 54-260.70. To lawfully practice the profession, an individual must possess these qualifications and be licensed by the Board. *Id.* Appellants' vagueness challenge goes to the definition of the "practice of funeral services." The statute reads in pertinent part:

> (2) "Practice of funeral services" shall mean engagement in the care or disposition of the human dead or in the practice of disinfecting and preparing by embalming or otherwise the human dead for the funeral service, transportation, burial or cremation, or in the practice of funeral directing or embalming as presently known, whether under these titles or designations or otherwise. It shall also mean the *engagement of making arrangements for funeral service*, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies.

Id. 54-260.67(2) (emphasis added).

Appellants maintain that the phrase "engagement of making arrangements for funeral service" is unconstitutionally vague and does not fairly warn them whether the arrangements made through the plan bring the Guardian salespersons within this definition. We find this argument meritless.

Recently, in *United States v. Santoro*, 866 F.2d 1538 (4th Cir.1989), we reiterated the principle that in challenges to statutes which do not implicate first amendment rights, "a party who engages in conduct clearly proscribed by a statute cannot complain of the vagueness of that

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[2]For analytical purposes, we will treat appellants' due process and equal protection challenges as one. We do this because, when reviewing economic regulations, the legal standard - rationally related to a legitimate state interest - is the same. *Sutker v. Illinois State Dental Society*, 808 F.2d 632 n. 1 (7th Cir.1986).

statute as applied to others." At 1542, *see also Village of Hoffman Est. v. Flipside, Hoffman Est.*, 455 U.S. 489, 494-95, 102 S.Ct. 1186, 1191-92, 71 L.Ed.2d 362 (1982). We find this principle controlling. Here, Guardian salespersons arrange every aspect of a client's funeral, from the type of service down to the variety of flowers. The itemized cost of the entire funeral is then calculated and the client purchases insurance to defray the expense. Guardian's advertisements tout the plan as an easy way to make "funeral arrangements" in the comfort of the client's home, and as a way to relieve clients' families "of the burden of funeral arrangements." Whatever vagueness inheres in the phrase "making arrangements for funeral service," appellants are in no position to raise it here. *Santoro*, 866 F.2d at 1542; *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir.1985). Appellants' activity clearly constitutes the "practice of funeral services" as defined by the Virginia act.

The licensing requirements for funeral service professionals in Virginia are extensive. The Commonwealth requires that an applicant must have been graduated from a school of mortuary science, completed a two-year apprenticeship, and have passed a rigorous examination on restorative arts, basic sciences, and funeral business principles. Va. Code § 54-260.70. Appellants' due process/equal protection challenge is premised on their belief that it is ludicrous to require a salesperson, who does nothing more than make preneed arrangements, to have the same credentials as a full-fledged funeral director. They argue that the proof of the irrationality of this requirement lies in the fact that, although designed to protect consumers, its effect is plainly anti-consumer by restricting consumer choice in this traditionally anti-competitive market. We are unpersuaded.

As economic regulations, we may not strike these requirements down unless they are "wholly arbitrary," without any basis in reason. *City of New Orleans v. Duke*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976). They must be upheld as long as they are rationally related to a legitimate state interest. Id. Appellants concede that Virginia's legitimate interest in protecting the health, safety and welfare of its citizens through regulation of the funeral profession is well recognized. *Walton v. Commonwealth*, 187 Va. 275, 46 S.E.2d 373 (1948); *see also Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632 (1949) (regulation of funeral insurance sales); *National Funeral Services, Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir.1989), (regulation of preneed funeral contracts); *Harry and Bryant Co. v. FTC*, 726 F.2d 993 (4th Cir.1984), *cert. denied*, 469 U.S. 820, 105 S.Ct. 91, 83 L.Ed.2d 37 (FTC regulation of funeral sales practices). Thus,

our only inquiry is whether a rational relationship exists between the licensure requirements and the state's interest.

Appellants' position boils down to a disagreement with the Virginia General Assembly's judgment in refusing to establish different licensure requirements for persons who do nothing more than arrange funerals. In essence, they seek to isolate, and treat differently, this one aspect of the funeral service profession. This argument has been rejected by several courts in regard to several other professions. *Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (upheld requirement that only a licensed optometrist or ophthalmologist may refit old lenses into new frames); *England v. Louisiana State Bd. of Medical Examiners*, 246 F.Supp. 993 (E.D.La.1965), aff'd 384 U.S. 885, 86 S.Ct. 1924, 16 L.Ed.2d 998 (1966) (upheld requirement that chiropractors must have a full medical license); *Sutker, supra*, (upheld requirement that only licensed dentists could fit dentures). The Supreme Court admonition in *Lee Optical* is directly applicable:

> [A] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, . . . , because they may be unwise. . . . "For protection against abuses by legislatures the people must resort to the polls, not the courts."

Id. 348 U.S. at 487-88, 75 S.Ct. at 464-65 (citations omitted). The Virginia General Assembly could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement. Our inquiry ends here. The wisdom of this determination is simply irrelevant. Because these licensure requirements are rationally related to a legitimate interest, they survive due process/equal protection scrutiny. Therefore, anyone who makes funeral arrangements in the Commonwealth of Virginia must be a licensed funeral service professional.

III.

Appellants Tharp and Rogers challenge Virginia's limitations on their ability to solicit preneed funeral clients over the telephone.[3] Their

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[3]The Commonwealth asserts that because neither of these appellants has personally engaged in preneed solicitation, neither has a personal stake in the resolution of this issue

(Continued on next page.)

initial contention is that the statute is vague and was not intended to prohibit preneed solicitation. They contend that the statute addresses only at-need solicitation. Our examination of the pertinent statutory language forces us to conclude otherwise.

The relevant portion of the statute prohibits:

> (c) Solicitation of dead human bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; however, this shall not be deemed to prohibit general advertising;
>
> (d) Employment by the licensee of persons known as "cappers," or "steerers," or "solicitors," or other such persons to obtain the services of a holder of a license for the practice of funeral service;
>
> (e) Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment;
>
> (f) The direct or indirect payment or offer of payment of a commission by the licensee, his agents, or employees for the purpose of securing business;

Va. Code § 54-260.74(2) (emphasis added).

Appellants' obvious concentration on subsection (c) does not change the plain language of subsections (d) and (e), which prohibits the employment of any solicitor or agent for the purpose of calling upon individuals by whose influence corpses may be sent to a particular funeral home. There is nothing in the language of this provision which limits its application to at-need solicitation, and, consequently, we may not do so.[4] Our conclusion that the legislature intended to ban preneed

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[3](*Continued from previous page.*) sufficient to give him standing. The district court properly rejected this argument. Both Tharp and Rogers are currently under investigation for their participation in the Guardian Plan and both have been threatened with criminal prosecution. Moreover, both desire to solicit preneed customers personally and on behalf of Guardian if this statute is overturned. Under these circumstances, appellants are immediately in danger of sustaining a direct injury because of the Commonwealth's actions, and thus, have standing to challenge the statute. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1664-65, 75 L.Ed.2d 675 (1983).

[4]Likewise, we are unpersuaded by appellants' argument that because preneed funeral contracts are addressed in Title 11 of the Virginia Code, that the regulation found in Title 54 of the Code could not have been intended to address preneed solicitation. Title 11 of the Code is the Title which regulates all contracts, while Title 54 is the Title which regulates the underlying funeral service profession. As the lower court recognized, the Virginia General Assembly could certainly have chosen to regulate different aspects of preneed funeral arrangements in different statutes.

solicitation has the strongest possible support, a 1988 joint resolution by the Virginia General Assembly which expressly states that preneed solicitation is prohibited by present law. House Joint Resolution 50.

Further, the language of this blanket prohibition of all solicitation to forewarn a reasonable person that the telephone solicitation of preneed funeral arrangements, the sole purpose of which is to direct a particular human body to a particular funeral home, is proscribed by the statute. *Gallaher, supra*, at 1160. Thus, these appellants cannot complain of vagueness. *Flipside, supra*, 455 U.S. at 495, 102 S.Ct. at 1191-92.[5]

Tharp's and Rogers' final contention is that the ban on telemarketing is an unconstitutionally over-broad, content-based restriction of their right to free commercial speech. In the companion case we decide today, *National Funeral Services v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989), we rejected this very argument.[6] While *Rockefeller* dealt with a ban on door-to-door solicitation, as well as telemarketing, it squarely held that a ban on the telemarketing of preneed funeral contracts in private residences,[7] when other viable advertising alternatives are left open, comports with the first amendment. In this case, Guardian's plan is so similar to the preneed contracts of *Rockefeller*, that there can be no principled analytical distinction. Furthermore, the Virginia statute leaves open ample alternatives for appellants to advertise their services.

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[5]The appellants' contention that Va. Code § 54-260.74 is unconstitutionally vague is best rebuked by their own pleadings. In response to a motion by the Commonwealth requesting that the district court abstain from hearing this case because it involved unsettled questions of state law, appellants stated:

> The statute rendering solicitation illegal (Va. Code § 54-260.74) is clear and unambiguous. There is *no* dispute about its meaning, and therefore abstention is completely inappropriate. (emphasis in original).

This passage reveals appellants' vagueness argument for what it is, an obfuscation erected to give them another basis for attacking this statute. The statute plainly prohibits solicitation and we so hold.

[6]As the concurrence points out, although *Rockefeller* rejected appellants' argument, the panel could not reach a consensus on the appropriate reasoning. Nonetheless, the holding of *Rockefeller*, that similar speech restraints were constitutional, applies with undiminished force to this case.

[7]The statute in question could arguably be read to ban all telephone solicitation, regardless if calls are made to private residences or not. However, appellants' challenge concerns only their direct marketing of the plan into private households. Therefore, the issue before us now is precisely the same as the one dispensed with by *Rockfeller*. We note that appellants cannot raise the potential unconstitutionality of this statute as applied to others because the first amendment overbreadth doctrine is not recognized in the context of commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81, 97 S.Ct. 2691, 2707-08, 53 L.Ed.2d 810 (1977).

Consequently, Virginia's ban on telemarketing also does not violate the first amendment.

IV.

In sum, the Commonwealth of Virginia's licensure requirements are not unconstitutionally vague and are consonant with the equal protection and due process of law. Likewise, Virginia's restriction on telephone solicitation by its funeral service professionals does not violate the first amendment. Therefore, in all respects, the district court is affirmed.

AFFIRMED.

KISER, District Judge, concurring:

I concur with the results reached by Judge Hall and in his opinion except as to his analysis of the First Amendment issue. For the reasons stated in my concurring opinion in *National Funeral Services v. Rockefeller*, I believe that the Virginia regulations are permissible time, place and manner restrictions on speech in the funeral profession.

BUTZNER, Senior Circuit Judge, dissenting:

Willard D. Tharp and Ben E. Rogers, Jr., licensed funeral directors, Guardian Plan, Inc., an insurance carrier, and one of its agents, Benny R. Benson, base their claim that Va. Code § 54-260.74 is unconstitutional on the following propositions:

1. "[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964).

2. The evidence discloses that state officials charged with enforcement and funeral licensees charged with obedience do not understand whether the statue prohibits telemarketing of preneed funeral arrangements.

3. Telemarketing of preneed funeral arrangements is a form of commercial speech that the first amendment protects from unwarranted governmental regulation. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-66, 100 S.Ct. 2343, 2348-51, 65 L.Ed.2d 341 (1980).

I will first discuss the proposition that the statute is unconstitutionally vague when tested by the principles explained in *Baggett v. Bullitt*. Next I will consider the claim that a per se prohibition of telemarketing preneed funeral arrangements constitutes "unwarranted governmental regulation" within the meaning of *Central Hudson*. Finally, I will

address Guardian's and Benson's claim that application of Virginia's licensing law for funeral directors and embalmers is unconstitutional.

I.

The appellants contend that Va. Code § 54-260.74, on which the Board relies to bar preneed solicitation by telemarketing, applies only to at-need and not to preneed solicitation. They point out that Va. Code § 11-24 minutely regulates preneed contracts without barring telemarketing. The confusion about which statute is applicable is not unfounded. A resolution passed by the Virginia General Assembly noted that laws relating to the sale of preneed contracts for funeral services are located in several titles of the Code and that the Attorney General has issued five opinions on the subject since 1984. See H.J. Res. 50, 1988 Reg. Sess. of the Va. Gen. Assem. In addition, the validity of the Board's regulations relating to the subject depend on statutory authorization, which in turn depends on which statute is controlling. This case presents a classic example of the precept: "Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery. . . ." *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967).

Certainly with respect to the legality of telemarketing § 54-260.74(2)(c), (d), (e), and (f) are vaguely worded. Telemarketing is not mentioned. Paragraph (c) bars solicitation of dead bodies "after death or while death is impending." By implication it does not bar solicitation of preneed arrangements from persons in good health. It is directed against at-need solicitation. *See Drummey v. State Board of Funeral Directors & Embalmers*, 13 Cal.2d 75, 87 P.2d 848 (1939) (identical statute).

Paragraph (d) prohibits licensees from employing " 'cappers,' or 'steerers,' or 'solicitors' " to get business. But this provision, silent about telemarketing, does not apply to Tharp and Rogers who are themselves licensees—not the employers of cappers, steerers, or solicitors. Guardian is not an employee of a licensee. Quite properly the district court did not find that Guardian is an employed capper, steerer, or solicitor.

Paragraph (e) is directed against employment of persons to call on individuals or institutions "by whose influence dead human bodies may be turned over to a particular funeral establishment." The appellants do not seek through telemarketing or otherwise to induce institutions or individuals to turn dead bodies over to them. Indeed, read literally, as the Board insists, this provision would bar all preneed contracting in direct conflict with § 11-24 which permits and regulates preneed contracting.

Paragraph (f) prohibits payment of a commission by a licensee to secure business. Again, this provision does not bar telemarketing.

In essence all of these provisions are directed against solicitation. But the Attorney General, citing § 11-24, has given an opinion that a licensee may solicit preneed business, provided that the potential buyer initiates a request. *See* Op. Att'y Gen. 232-33 (1985-86). This proviso puts a gloss on an otherwise unintelligible statutory scheme but it does not have the force of law. The Attorney General's opinion simply illustrates the vagueness that results from applying the at-need provisions of § 54-260.74(2)(c), (d), (e), and (f) to the preneed authorization of § 11-24.

It is little wonder that the Board's witnesses gave inconsistent testimony about whether § 54-260.74 prohibited preneed solicitation. Pursuant to Federal Rule of Civil Procedure 30(b)(6), the Board designated its Vice-Chairman, Frederick B. Carter, to testify on its behalf. He testified:

> Q. So the funeral service licensee would look at the law to determine whether the preneed solicitation is legal or illegal?
>
> A. In response to numerous questions of what were the limits of preneed solicitation, we sent everybody a copy of the operative statutes.
>
> Q. How would the licensee know what the Board's ultimate decision would be about verifiability of the preneed solicitation as it affects its legality or illegality?
>
> A. He would have to employ a fortune teller.

Later dealing with salesman solicitation, he testified:

> Q. But there is not an automatic prohibition on having salesmen solicit?
>
> A. No. We are very careful to note that we must use the less intrusive form to enforce the rights of people to have freedom of choice. I think that is probably federal, and certainly it is under your commercial free speech.

When Mark L. Forberg, Executive Secretary of the Board for eight years, read Carter's deposition, he became concerned about what Carter thought the law provided. He therefore consulted the Chairman of the Board. Forberg testified:

> Q. You basically told Mr. Teague [the Chairman], "Listen, Mr. Carter gave testimony that was differe..t than what I understand the Board's position to be"?

A. That's true and I was concerned as to my comments would be differing from his and to let them know that they may very well be.

Emphasizing his disagreement with Carter's testimony, Forberg testified: "To my understanding the Board has always taken the position that solicitation, in-person solicitation, by phone or actually door-to-door is prohibited."

The inconsistent testimony of Carter and Forberg is not simply a difference of expression. It is more fundamental. The Board answered an interrogatory by saying that the practice of "directly soliciting customers by telephone and follow-up home visits is a questionable practice, which, depending upon the context and content of such solicitation, may violate Virginia law." Again, in response to a motion to dismiss, the Board took the position:

> Only targeted telephone calls and in-person interviews are "questionable"; only if the content and circumstances of this type solicitation are such as to violate the law would the Board seek to prohibit its licensees from continuing such solicitation. Misleading or fraudulent commercial speech is not protected by the First Amendment.

At trial, however, the Executive Secretary interpreted § 54-260.74 quite differently when asked to comment on the Board's pleading:

> Q. Starting at the very bottom, ["o]nly targeted telephone calls and in-person interviews are questionable. Only if the content, circumstance of this type solicitation are such as to violate the law would the Board seek to prohibit its licensees from continuing such solicitation.["]
>
> Do you see that?
>
> A. Yes.
>
> Q. Now, that is not consistent with what you believe the Board's position has been for the past eight years, is it?
>
> A. We have been operating that any kind of direct contact, either by phone or in person, is prohibited.

In order to dispel the manifest vagueness of the statute, the Board called an expert witness. He testified:

> Q. Well, let me ask it again. I don't understand. Are you saying that it is illegal for you to send out one letter to someone asking them to come see you, but legal to send out many letters?
>
> A. In my mind.

With reference to telemarketing, he said:

> I don't think, you know, as far as what you prohibit and what you don't prohibit, I don't think that you can make a distinction. As far as using telemarketing and direct solicitation, as far as preneed funerals, I think if you do it and everybody gets a phone call, that is one thing. If you just target select groups because of age, because of economics, affluence and what not, I think that is in a sense a form of discrimination. You know, if you call everybody, that is fine.

With the Board's witnesses in disagreement about solicitation of preneed funeral arrangements, it appears that the Board and the district court, echoed by this court, have been compelled to place primary reliance on House Joint Resolution No. 50 to demonstrate that Virginia law pertaining to telemarketing is not vague. The Resolution proposed a study of issues concerning regulation of the funeral industry. Included among these issues is the following: "What forms of solicitation for preneed contracts should be allowed or should the solicitation of preneed contracts be prohibited as *provided in the present law*?" (emphasis added).

Unlike my brothers, I am not persuaded that this resolution is an authoritative clarification of an otherwise hopelessly vague law. It is axiomatic that it is not a legislative function to interpret prior statutes. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803); *Gorman v. Sinking Fund Comm'rs*, 25 F. 647, 650-51 (1885) (Virginia coupon cases). In this instance reliance on the Resolution is particularly inappropriate. The General Assembly undertook to declare the meaning of a statute that was enacted 38 years ago. The Board has not provided any legislative history of the Resolution, but it appears from the record that it was passed while this litigation was pending at the behest of the Board. It is not surprising that the interpretation placed on the statute buttresses the Board's litigating position. But even so, the Resolution is in error in conveying the impression that solicitation of preneed contracts is prohibited by present law. The Attorney General now concedes that solicitation is not prohibited. According to her, funeral directors may solicit preneed contracts by general advertising, targeted advertising, general mailings, and in-person interviews initiated by the consumer. Reliance on the Resolution illustrates the wisdom of the rubric: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332 4 L.Ed.2d 334 (1960).

The state's largest organization of the funeral industry, the Virginia Funeral Directors Association, Inc., which intervened to support the Board, is also confused by the vagueness of Virginia law on the practice of telemarketing preneed funeral arrangements. In August 1987 the Association took the position that funeral directors are not allowed direct solicitation of preneed contracts. But in March 1988 the Association included in its proposed findings of fact and conclusions of law the following: "State law does not prohibit the solicitation of preneed funeral contracts. Only solicitation at-need, a valid and rational limitation, is prohibited. Virginia Code Section 54-260.74(2)(c)."

The testimony of the Board's witnesses, its pleadings, its attempt to use the House Joint Resolution as a bulwark of its case, and the intervenor's vacillation demonstrate that § 54-2 60.74, tested by the precepts of *Baggett v. Bullitt*, 377 U.S. at 367, 84 S.Ct. at 1320, is unconstitutionally vague when applied to telemarketing of preneed funeral arrangements. Revocation of the licenses held by Tharp and Rogers or prosecution of the appellants for telemarketing would deprive them of their property and liberty in violation of the due process clause of the fourteenth amendment.

II.

Although the vagueness of § 54-260.74 provides a sufficient reason for reversing the judgment of the district court, I will address the appellants' claim that the prohibition against telemarketing violates the first amendment as incorporated by the fourteenth amendment. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), the Supreme Court prescribed the following four-party analysis to determine whether commercial speech is protected by the first amendment:

> [Commercial speech] at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Selling preneed funeral arrangements is a lawful activity. It is recognized and regulated by Va. Code § 11-24. Telemarketing is not fraudulent or misleading. It is widely used by business and industry to promote the sale of variety of products and services.

States have a substantial interest in time, place, and manner restrictions on speech. But Virginia's prohibition against telemarketing preneed funeral arrangements is not a time, place, and manner restriction. It is a restriction based on the content of speech. Content alone sets apart telemarketing of preneed funeral arrangements from the telemarketing of other goods and services. Consequently, the state lacks constitutional authority to prohibit such telemarketing under the guise of a permissible time, place, and manner restriction. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).

Nevertheless the state has substantial interest in the sale of preneed funeral arrangements. Since these arrangements involve the present payment of money for future expenditure, the state has an interest in seeing that the money remains available. The state also has an interest in protecting consumers from fraud and coercion. The state's interest leads to consideration of the last two factors of the *Central Hudson* analysis: "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566, 100 S.Ct. at 2351.

Prohibition of telemarketing does not directly advance the governmental interest of safeguarding preneed funeral payments. Sections 11-24 and -25 specify the content of preneed contracts and the means of safeguarding payments. Telemarketing is not inherently fraudulent or coercive. This is demonstrated by the fact that although the state outlaws fraud in any form, it permits telemarketing of other legitimate products and services. Coercion can be avoided by simply hanging up the phone. Furthermore, as an antidote to coercion or any other cause for dissatisfaction, § 11-24 permits consumers to rescind preneed contracts and to recover their payments at any time before funeral services are furnished.

Additional evidence showing that Virginia's prohibition against telemarketing preneed funeral arrangements is unnecessary to directly advance the state's interests is found in the Regulatory Review Report of the Virginia Board of Funeral Directors and Embalmers issued March 1, 1985. After public hearings, the Board proposed to modify its regulations proscribing, except by general advertising, solicitation of funeral business. The proposed regulation provided: "The advertising or direct contact by a Virginia Funeral Service Licensee or Funeral Director for preneed funeral planning, pursuant to Chapter 5 (§ 11-24 et seq. of Title 11), shall not constitute solicitation." The Vice-Chairman testified that "the Board unanimously considered the change to be in the interest of the public or it wouldn't nave recommended it." This proposal was

consistent with section 5 of "A Model Law for Prepaid Funeral Arrangements," developed by the American Association of Retired Persons. The drafters note that section 5 "offers the consumer the convenience of telephone and door-to-door sales."

The recommendation of the Board came to naught. It was successfully opposed by funeral directors who, according to the testimony of the Board's Executive Secretary, thought that a regulation allowing preneed solicitation "placed them in a position where they felt that if they were to maintain a viable business they would have to compete with the others." From all of this one may justifiably infer that the Board's application of § 54-260.74 to bar telemarketing exists primarily to prevent competition instead of advancing the legitimate interests of the state.

The evidence disclosed by this record, analyzed according to *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351, establishes that application of § 54-260.74 to ban telemarketing of preneed funeral arrangements infringes the appellants' right to commercial speech that is protected by the first and fourteenth amendments.

III.

Guardian and Benson challenge the Board's application to them of laws requiring funeral directors and embalmers to be licensed. Guardian is a life insurance company fully regulated by the State Corporation Commission. Benson and its other salespersons must be licensed insurance agents. Its policies and annuities must conform to Virginia's insurance laws. Guardian and its affiliated company write life insurance policies and annuities to cover funeral expenses. The insured may revocably assign the insurance proceeds to Guardian. Guardian contracts with a local funeral home in the area to provide eventual funeral services in accordance with the preneed arrangements the insured has selected. The insured may revoke the assignment at any time and name another beneficiary or cancel the policy in accordance with the stipulated cash surrender value. He can change his funeral plans at any time and select another funeral home. After the insured dies his next of kin can use all or some of the proceeds to pay for the funeral at a funeral home of their choice. The preneed arrangements must be approved on two occasions by licensed funeral directors who agree to provide the services, initially when the insured revocably assigns the policy and subsequently when at-need arrangements are made by the insured's next of kin.

To become a licensed funeral director and embalmer, Guardian's insurance agents would have to graduate from a mortuary school. Virginia's school has a two-year program. The agents would then have to pass

an examination on a number of subjects, including anatomy, chemistry, bacteriology, pathology, public health, embalming, restorative art, and psychology. In lieu of attending a mortuary school, the agents could solicit a position as resident trainees in a funeral home for two years. Each agent would have to assist in embalming 25 bodies and in conducting 25 funerals. Va. Code §§ 54-260.70 and 54-260.72.

The Board, aware that we judges, like other human beings, have a penchant for passing complex controversies to someone else for solution, urges us to require Guardian to take its complaint to the legislature. Frequently such a course is justified. There may be no judicial remedy for a litigant's complaint; the only relief may come from the legislature by a change in the law. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Contrary to the Board's argument, this case presents no occasion for referring Guardian to the legislature. No Virginia statute requires life insurance agents who fund preneed funeral arrangements to be licensed funeral directors and embalmers, and no Virginia court has construed the law to impose this requirement.

Indeed, Va. Code §§ 11-24 and 54-260.74 appear to contemplate that persons other than licensed funeral directors may contract for preneed funeral arrangements. Section 11-24 provides in part:

> It shall be unlawful for *any person, firm or corporation*, residing or doing business within this Commonwealth, to make, either directly or indirectly by any means, an agreement for the sale of personal property to be used in connection with the final disposition of a dead human body, or for the furnishing of professional services of a funeral director or funeral service licensee, including cremation services, wherein the personal property is not to be delivered or the services are not to be rendered until the occurrence of the death of the person for whose funeral, burial or other disposition such property or services are to be furnished unless (i) any such agreement be in writing. . . . (emphasis added)

It is significant that the statute's prohibition is directed to "any person," which, of course, would include Guardian's agents. In the same sentence the statute draws a distinction between "any person" and a "funeral director."

Section 54-260.74 generally proscribes illegal practices by licensed funeral directors. But when the statute regulates insurance for funeral services, its provisions are not directed to licensed funeral directors.

Instead, the statute addresses any company, corporation, or association. It provides:

> No *company, corporation or association* . . . engaged in the business of providing any insurance upon the life of any individual, under which contract of insurance any obligation might or could arise to care for the remains of the insured, shall contract to pay or shall pay any such insurance or such benefits, or any part of either such insurance or benefits, to any funeral establishment or to any licensee or to any individual in any manner which might or could deprive the representative, next of kin, or family of such deceased person from, or in any way control them or any of them in procuring such funeral establishment, person licensed for the practice of funeral service or other proper and competent person to perform such necessary and proper services, and to furnish supplies as may be necessary and proper to care for the remains of such decedent as such representative, next of kin, or family may desire (emphasis added).

There is no contention that Guardian's practices violate either § 11-24 or the insurance provision of § 54-260.74, other than the fact that Guardian's agents are not licensed funeral directors.

Despite §§ 11-24 and 54-260.74, which recognize that persons and companies, other than funeral directors, can enter into preneed contracts with consumers and sell preneed insurance, the Board relies on a definition of funeral services that does not even mention preneed contracts or insurance. Virginia Code § 54-260.67(2) includes among those activities constituting the "Practice of funeral services," for which a license is needed, "the engagement of making arrangements for funeral services." The Board has interpreted this definition to apply to Guardian's business. Guardian contends that this application of the statute renders it vague as applied and violates the due process clause. In response to the claim of vagueness, the Board relies on *Village of Hoffman Estates v. Flipside*, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), for the proposition: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." 455 U.S. at 495, 102 S.Ct. at 1191.

The Board's reliance on *Flipside* is misplaced. *Flipside* dealt with a "facial challenge" to an ordinance. 455 U.S. at 491, 102 S.Ct. at 1189. But

Guardian does not challenge the facial validity of § 54-260.67(2). The definition contained in this section may not be facially vague when applied to at-need arrangements. Guardian challenges the Board's application of the ordinance to its preneed business. In *Flipside* the Court was careful to reserve constitutional questions arising out of the application of the ordinance. 455 U.S. at 503-04, 102 S.Ct. at 1195-96. Because this case involves the application of the statutory definition to Guardian, *Flipside* does not bar Guardian's challenge. Therefore, the issue is whether § 54-2 60.67(2) as applied to Guardian's preneed business is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. at 367, 84 S.Ct. at 1320.

One way of determining whether a law is vague is to question the people who enforce it. The Board's Vice-Chairman, designated by the Board as its Rule 30(b)(6) spokesman, could give no clear answer about the legality of Guardian's preneed business. He testified:

> Q. Does the law have a bright-line rule about when an insurance agent, what we have been discussing, crosses the line and starts to violate the law, or is it back to the gray area?
>
> A. There is no bright line in the law. There is a line that says you're not supposed to engage in doing that which tends to restrict the freedom of choice of the purchaser or of the general public to select a funeral director of their choice. That is the line. Reasonable men might disagree on what that is all about. . . .
>
> * * * * * * * *
>
> Q. So the Board interprets the law as forbidding a nonlicensee from discussing funeral merchandising and costs, is that correct?
>
> A. That is what the minutes say. The minutes are correct.
>
> Q. Okay. Now would that apply to someone who is not an employee of a funeral service establishment?
>
> A. I don't know.

In his deposition the Executive Secretary testified:

> Q. . . . Do you know personally, Mr. Forberg, where the line is drawn between discussing goods and services as

part of an insurance agent's activity and making arrangements as the statute defines?

A. Not completely.

At trial the Executive Secretary testified:

Q. You need a license only if you are going to sign on the dotted line?

A. At the point where arrangements are made and merchandise is sold and arrangements are actually made.

* * * * * * * * *

Q. Well, can an insurance agent discuss specific cost of casket and flowers and all?

A. That is the gray area. I don't know.

Q. How would an insurance agent know?

A. Probably wouldn't.

Guardian, of course, is subject of criminal prosecution if it steps over line.

When the Board designed spokesman testified, he repudiated the Executive Secretary's testimony, saying: "Our Secretary was wrong." The spokesman took the position that an insurance agent would violate the law by mentioning items and prices of funeral services even though the consumer and the agent did not enter into an agreement for furnishing the services.

Another example of the law's vagueness as applied to Guardian's insurance business is disclosed by the following controversy among those who enforce the law concerning the application of § 54-260.73 which requires a funeral home to have a fully equipped embalming room. After explaining that the Board would not permit an insurance office to be located in a funeral home, the Executive Secretary testified:

Q. If he [the insurance agent] intended to merely discuss or make preneed arrangements, he would need an embalming room in his office?

A. Correct.

Q. Also need instruments in his office?

A. Correct.

Q. Wouldn't he need all the necessary instruments and supplies for the preparation of and embalming of dead human bodies in his insurance office?

A. Right.

In contrast, the Attorney General insists that there is no such requirement. The Attorney General takes the position that if the insurance agent obtains a license as a funeral director and embalmer he need not have an embalming room in his office. This, perhaps, is a little less irrational than the Secretary's position, but it is, nevertheless, another manifestation of the vagueness resulting from the Board's application of the definition in § 54-260.67(2) to the business of writing insurance coverage for preneed funeral arrangements.

The General Assembly of Virginia has dealt with contracts and insurance pertaining to preneed funeral arrangements in a straightforward way in §§ 11-24 and 54-260.74 by setting forth the rules that "any person" or "any company" must follow to engage in this business. But the Board by its tortured application of the definition in § 54-260.67(2) has rendered the law so vague that it violates the rights secured to Guardian and Benson by the due process clause.

As an independent ground for reversal, apart from vagueness, Guardian contends that the requirement that its insurance agents become licensed funeral directors and embalmers is so irrational that it violates the due process clause. For the purpose of this dissent it is unnecessary to address this argument. The vagueness of the law as applied by the Board to Guardian's business provides a sufficient ground for reversing the district court on the issue of licensing.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3101

Guardian Plans, *et al.*,

Plaintiffs - Appellants,

v.

Joseph W. Teague, *et al.*,

Defendants - Appellees.

On Petition for Rehearing

Upon consideration of appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Kiser, United States District Judge sitting by designation. Senior Judge Butzner dissents.

For the Court

John M. Greacen /S/

CLERK

Filed April 12, 1989

NATIONAL FUNERAL SERVICES, INC.,
Plaintiff-Appellant,

v.

ROCKEFELLER, *et al.*,
Defendants-Appellees,

and

AMOS QUESENBERRY, *et al.*,
Defendants.

No. 88-3945
United States Court of Appeals,
Fourth Circuit
March 7, 1989

Before HALL, Circuit Judge, BUTZNER, Senior Circuit Judge, and KISER, United States District Judge for the Western District of Virginia, siting by designation.

K.K. HALL, Circuit Judge;

In this declaratory judgment action, National Funeral Services ("NFS") appeals the district court's judgment, which upheld the constitutionality of W.Va. Code § 47-14-1 *et seq.* (1983) and found that the Act's provisions were not preempted by the Federal Trade Commission's ("FTC") Funeral Rule, 16 C.F.R. 453. On somewhat different reasoning, we affirm.

I.

This case revolves around the State of West Virginia's attempt to regulate preneed funeral contracts, codified at W.Va. Code § 47-14-1 *et seq.* (1983).[1] These contracts have been tightly regulated in the state since

[1]The statute provides its own definition of "preneed funeral contracts":

> "Preneed funeral contract" means any contract, agreement, mutual understanding, series or combination of contracts, agreements and mutual understandings, other than a contract of insurance, under which, for a specified consideration paid in advance of death in a lump sum or by installments, a person promises to furnish or make available or provide funeral services, funeral goods or burial goods for use at a time determinable by the death of the "contract beneficiary" who is either named or implied.

W.Va. Code § 47-14-2(12) (1983).

1955, when the West Virginia legislature found them to be void and against public policy unless all of the contract proceeds were placed in trust, pending the contract beneficiary's time of need. W.Va. Code 47-14-1 (as amended in 1965, 1983). Unlike other states that have chosen to regulate these contracts through regulation of the funeral service profession, *see Guardian Plans v. Teague*, 870 F.2d 123 (4th Cir. 1989) (Virginia), West Virginia's regulatory scheme focuses on the methods of sale and the terms of the contracts themselves.

The statute establishes a comprehensive regulation of all preneed sales of burial goods, funeral goods, or funeral services,[2] and declares preneed contracts void unless they are drafted, solicited, and executed according to its dictates. W.Va. Code § 47-14-1 (1983). It regulates all sellers of such goods and services and requires that they be licensed by the state. *Id.* § 47-14-3. Likewise, all agents or employees of a seller, who participate in the sale of these contracts, must be state certified. *Id.* § 47-14-4.

While the general advertisement of these contracts is not restricted, in an attempt to reduce fraud and preserve privacy, the statute prohibits in-person and telephonic solicitation of prospective purchasers in nursing homes, hospitals, and private residences, as well as the solicitation of relatives of persons near death. *Id.* § 47-14-10. Once a sale is made, the statute establishes elaborate procedures for entrusting the proceeds of the sale[3] and for the disposition of the trust income. *Id.* § 47-14-5, 8. Also, the Act requires that a seller provide the promised services at the contract price, regardless of whether the price of the services at the time of need exceeds the trust corpus. *Id.* § 47-14-7. This price guarantee also requires that if the goods and services cost less than the proceeds, the difference must be refunded to the purchaser. *Id.* Finally, a contract must be revocable at all times by a purchaser, while only revocation for nonpayment is available to seller. *Id.* § 47-14-6.

Consistent with its purpose of protecting consumers, the Act creates a civil remedy, complete with attorney fees, for any breach of its provisions. Further, criminal penalties are available for anyone who mishandles contract proceeds. *Id.* 47-14-8.

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[2]These three terms are words of art defined by the statute. See W.Va. Code § 47-14-2(1), (7), (8) (1983). Roughly speaking, they encompass every good and service necessary from a corpse's initial preparation to its final entombment. Goods and services provided by cemeteries acting as such, however, are exempted from regulation. Such unregulated sales can encompass cemetery lots, markers, crypts, urns, or incidental related services. Nonetheless, cemeteries that attempt to provide other non-excluded goods and services on a preneed basis are subject to regulation.

[3]The current statute requires that only 90% of contract proceeds be entrusted.

It is obvious from this exhaustive regulatory scheme, as well as the express language of the statute itself, that the West Virginia legislature considers these contracts to be a threat to the consuming public. *Id.* § 47-14-10(e). Through its police powers, it has allowed them to exist only under carefully circumscribed conditions. It is from this perspective that we must view NFS's challenges.

NFS entered the preneed funeral service market in West Virginia in 1980. At that time, the trust requirements[4] of the statute had been ruled unconstitutional by an inferior state court. Consequently, NFS began its sales operation without having to comply with the statute's current measures. However, in 1982, the West Virginia Supreme Court of Appeals reinstated the statute's trust requirements, finding them fully constitutional. *Whitener v. W. Va. Bd. of Embalmers and Funeral Directors*, 169 W.Va. 513, 288 S.E.2d 543 (1982).

In the wake of this decision, the West Virginia legislature, in 1983, substantially overhauled the statute to create the comprehensive regulatory framework present today. Prior to these amendments, many aspects of the regulation were not present, including the solicitation restrictions. Shortly after this overhaul, NFS filed suit.

In the court below, NFS contended that the statute was preempted by federal regulation, challenged several aspects of the statute's constitutionality, and sought a preliminary injunction against its implementation. NFS also alleged various antitrust claims against the West Virginia Funeral Director's Association and several individual funeral directors. Finding the potential for irreparable injury to NFS, the lower court granted a temporary restraining order and a preliminary injunction pending the final adjudication of the constitutional claims.

After a long period of posturing and negotiation, the antitrust claims were eventually settled and the case proceeded to a bench trial on the challenges to the statute. The district court upheld the statute in all respects.[5] This appeal followed.

II.

NFS's first contention is that the Funeral Rule, promulgated by the FTC, so pervasively regulates the funeral industry that it preempts West

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[4]Between 1965 and 1983, W.Va. Code § 47-14-1, *et seq.* (1983) required that 95% of preneed contract proceeds be entrusted.

[5]In the proceedings below, this case was consolidated with another suit, brought by Mountain State Funeral Association, a nonprofit corporation that sold preneed funeral contracts. Mountain State did not appeal the district court's decision.

Virginia's extensive regulation of preneed funeral contracts. NFS's alternate contention is that the statute's prohibition of unrequested, in-home personal and telephonic solicitation violates its right to free commercial speech.[6] We address the preemption question first.

Beginning in 1972, the FTC conducted an extensive, nationwide investigation into funeral practices. What the investigation revealed was widespread fraudulent sales practices and a general reluctance of funeral directors to disclose the individual prices of the goods and services they marketed as packages. *Harry and Bryant Co. v. FTC*, 726 F.2d 993, 999-1001 (4th Cir. 1984), *cert. denied* 469 U.S. 820, 105 S.Ct. 91, 83 L.Ed.2d 37. In response to this national problem, the FTC promulgated the Funeral Rule, found at 16 C.F.R. § 453. The goal of the rule "is to lower existing barriers to price competition in the funeral market and to facilitate informed consumer choice." 47 Fed.Reg. 42260 (Sept. 24, 1982). It proscribes several fraudulent sales practices and mandates the pre-sale disclosure of prices to consumers. Specifically, it requires the disclosure of prices to consumers who request such information over the telephone. 16 C.F.R. § 453.2(b)(1)(i). Notably, the rule does not focus on the preneed funeral market, but on the much larger at-need market.

The gist of appellant's preemption argument is that the trusting requirements of the Act, coupled with its prohibitions on solicitation, make it impossible for appellant to profitably stay in business. Thus, the argument goes, this regulation insulates the marketplace from NFS's competition and, consequently, restricts the widespread dissemination of funeral price and product information mandated by the FTC's Funeral Rule. Appellant maintains that the Act's prohibition of door-to-door and telephone solicitation is particularly opposed to the strong public policy behind the Funeral Rule. We find this argument unpersuasive.

In determining whether federal regulation preempts concurrent state regulation, three inquiries are relevant: (1) whether the federal regulation is so pervasive that it is reasonable to assume that Congress did not intend for state regulation; (2) whether the field regulated is an

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[6]In the court below, NFS also argued that the Act's exemption from regulation of cemeteries, its restrictions on commercial speech, and its 90% trusting requirement were so irrational and arbitrary that they could not withstand due process/equal protection scrutiny. *See New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). The district court properly rejected this feckless argument. We need not address this issue though, because appellant conceded at oral argument that it was without merit. *See also Whitener, supra* (West Virginia court ruled that exemption of cemeteries and 95% trusting requirement in predecessor statute were constitutional).

area of such dominant federal interest that preclusion of state regulation must be assumed, and; (3) whether simultaneous enforcement of the state regulation raises the serious danger of conflict with the Federal program. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 502-505, 76 S.Ct. 477, 480-482, 100 L.Ed. 640 (1956). This test, applied to the case at hand, clearly shows that West Virginia's regulation is not preempted.

First, we note that the Funeral Rule is a limited regulation focusing on fraudulent sales practices and price disclosure. 47 Fed.Reg. 42260-61 (Sept. 24, 1982). It simply does not attempt a comprehensive regulation of the funeral industry. Furthermore, there is no language in the Funeral Rule that even alludes to an intent to preempt state regulation in the area it does cover. In fact, the Rule expressly states that where a state law is applicable to any transaction that the Rule covers, and that state law affords at least the same level of protection to consumers that federal law provides, the Rule will not be in effect in that state. 16 C.F.R. § 453.9. Thus, not only is the Funeral Rule not a preemptive, pervasive regulation of the funeral industry, it actually encourages concurrent state regulation.

While it is obvious that federal regulation does not preclude West Virginia' regulation, we must address appellant's contention that these two regulatory schemes are in conflict. Clearly, they are not. Both strive to protect consumers. To the extent that the Funeral Rule regulates preneed funeral contracts at all, it merely mandates the disclosure of price information and forbids unfair sales practices. West Virginia's statute likewise attempts to curb fraudulent overreaching by curtailing the solicitation of vulnerable people who are hospitalized or institutionalized or in the sanctuary of their own homes. W.Va. Code § 47-14-10(e) (1983). Likewise, the state's prohibition of *unrequested* telephone solicitation does not conflict with the Funeral Rule's mandate that price information be given over the phone when *requested* by consumers. And, we do not even see a connection, let alone a conflict, between the Funeral Rule and the West Virginia Act's trusting requirements.[7] Therefore, we conclude that W.Va. Code § 47-14-1 *et seq.* (1983) was not preempted by federal regulation.

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[7]To the extent that appellant argues that these requirements prevent it from operating profitably, and thus, lead to an anti-competitive market, it failed to prove its case below. The trial court specifically found that "preneed sales businesses can be operated in compliance with the statute at a profit by the exercise of good business practices." As a finding of fact, we cannot overturn this conclusion unless it is clearly erroneous, however, we are spared this decision because appellant does not challenge the finding on appeal. Consequently, we must assume that this argument is not supported by the evidence.

III.

Appellant's first amendment challenges focus on the Act's ban on uninvited door-to-door and telephone solicitation:

> (a) Any contract seller or agent or employee or person acting in behalf of any such person may not: . . .
>
> (5) Solicit by telephone call or by visit to a personal residence, unless such solicitation has been previously requested by the person solicited or by a family member residing at such residence.[8]

Id. § 47-14-10(a)(5). Appellant contends that this provision is an unconstitutionally broad, content-based prohibition of its legitimate commercial speech. It maintains that the government interests of preventing overreaching by preneed salesmen and protecting the privacy interests of consumers can be furthered by less onerous restrictions. In particular, appellant points to W.Va. Code § 46A-2-132 (1974)—which provides that a consumer may cancel any in-home sale within 72 hours—to argue

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[8]The statute also proscribes solicitation in several other situations. Appellant does not contest these provisions:

> (a) Any contract seller or agent or employee or person acting in behalf of any such person may not:
>
> (1) Directly or indirectly call upon individuals or persons in hospitals, rest homes, nursing homes or similar institutions for the purpose of soliciting preneed funeral contracts or making funeral or final disposition arrangements without first having been specifically requested by such person to do so; . . .
>
> (3) Solicit relatives of persons whose death is apparently pending or whose death has recently occurred for the purpose of providing funeral services, final disposition, burial or funeral goods for such person;
>
> (4) Solicit or accept or pay any consideration for recommending or causing a dead human body to be provided funeral services and funeral and burial goods by specific persons, or the services of a specific crematory, mausoleum or cemetery except where such arrangement is the subject of a preneed funeral contract; . . .
>
> (d) Anyone making a personal or written solicitation for a preneed funeral contract shall, at the very first instance, divulge the real reason for the contract or solicitation.
>
> (e) The department may adopt rules regulating the solicitation of preneed contracts by certificate holders or registrants to protect the public from solicitation practices which utilize undue influence or which take undue advantage of a person's ignorance or emotional vulnerability. (1983, c. 161).

that the state's interest in preventing fraud is already adequately protected. As to the government's assertion that these prohibitions protect privacy, appellant maintains that even if privacy were protected by the restrictions, they are too broad to survive first amendment scrutiny. Appellant amplifies its argument in regard to the ban on telemarketing, positing that the perceived risks of overreaching and invasion of privacy inherent in personal solicitation, which could possibly justify the door-to-door ban, are simply not present when sales are conducted over the telephone. We address this argument point-by-point.[9]

The trial court rejected appellant's position that these restrictions were content-based and upheld them on the theory that they were permissible time, place, and manner restrictions. The district court reasoned that the prohibitions did not turn on the content of appellant's

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[9]We reject the dissent's suggestion that because we have upheld the 90% trust requirement, the appellant's first amendment challenges are mooted. This position is premised on the erroneous view that appellant was driven out of business by the trust requirement alone and has made that the centerpiece of its case. Appellant made it perfectly clear at oral argument, however, that its first amendment challenges were fundamental to this dispute:

> Judge Butzner: You have to fund 90%?
>
> Appellant: Yes, your Honor.
>
> Judge Butzner: And you want to hold that's unconstitutional.
>
> Appellant: No, your Honor. No, we submitted an argument which in part we felt that the 90% was irrational. We have no problem at all with the concept, with the requirement or need of trusting.
>
> Judge Butzner: Well, I don't understand. You don't agree that 90% trusting is constitutional, do you?
>
> Appellant: Your honor, we submitted what I believe is a very minor part of our case that we believe that it was an irrational decision on the part of the legislature. There were numerous actuarial studies, some of which in our record which reflect that 50% of the cost is much more than adequate to find these promises. That's the only part there, it's a very minor point.
>
> Judge Butzner: All right.

Later, the argument turned to the first amendment questions:

> Judge Hall: But they (salesmen) go into the home in person or by telephone, unsolicited?
>
> Appellant: Yes they do, your Honor.
>
> Judge Hall: That's the point of this case, that's what your suit is about.
>
> Appellant: Yes, your Honor.
>
> Judge Hall: That is the case.
>
> Appellant: That's the first amendment argument, that's the jewel to this case, that's the central argument.

solicitation, but rather on the places appellant chose to solicit. Although this analysis is facially appealing, I believe that it cannot withstand closer examination.[10]

The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are other speech restraints. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). Their intent is not to influence what a speaker has to say, only when, where, or how he says it. Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. *Id.* 106 S.Ct. at 930.

In one sense, the restrictions in question do not regulate the content of appellant's solicitation—it may make any sales pitch it pleases—they merely dictate where and how appellant may make its pitch. However, in a more fundamental sense, these restrictions are content-based. That is, only solicitors who attempt to speak about preneed funeral contracts are restricted. Thus, even though the statute restricts only the manner and places appellant may solicit business, it turns on the type of business appellant solicits. Therefore, I cannot adopt the trial court's reasoning and shall carefully scrutinize this statute as a content-based restriction.

IV.

Before beginning this analysis, I pause to note that both parties agree that the speech in issue is purely commercial. As such, although protected by the first amendment, that protection is limited. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S.328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986); *Project 80's Inc. v. City of Pocatello*, 857 F.2d 592, 595 (9th Cir. 1988). It is beyond question "that the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 64-65, 103 S.Ct. 2875, 2878-79, 77 L.Ed.2d 469

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[10]As Judge Kiser notes in his concurrence, although we both reach the same result, that this statute is constitutional; we do so through different reasoning. I cannot concur in Judge Kiser's conclusion that this statute effects time, place, and manner restrictions because it relies too heavily on a false premise, that this statute regulates the funeral profession. A careful reading of the statute shows that it applies to "any person," not just members of the funeral profession. Therefore, even though I believe professional solicitation cases are closely analogous, see n. 11 *infra*, I do not believe that they are so closely analogous that traditional commercial speech analysis sh ·ld not apply. Thus, the following discussion reflects only my own view of the statute's constitutionality.

(1983). And, it is equally well settled that the potential for deception and invasion of privacy inherent in some forms of commercial speech can, and has, justified content-based restrictions. *Curtis v. Thompson*, 840 F.2d 1291, 1298 (7th Cir. 1988). Furthermore, these restrictions can certainly be based on the place and manner of the expression, because the protection due commercial speech often turns on the nature of its expression. *Central Hudson Gas v. Public Service Comm. of N.Y.*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980). As the Supreme Court has observed, "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." *In re R.M.J.*, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982).

These principles of law make clear that scrutiny of this statute must be guided by the "common sense" distinction between commercial speech and noncommercial speech. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 1830 n. 24, 48 L.Ed.2d 346 (1976). First amendment jurisprudence has evolved the disparity of treatment between the two for a reason:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). It is with this view of commercial speech, properly placed in its constitutional context, that I undertake my analysis.

Review of this statute is guided by the four-part test enunciated in *Central Hudson, supra*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether

> the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. at 2351.

Turning to the facts of this case, the state has not contended that appellant's solicitations were in any way fraudulent or misleading. Therefore, I must conclude that appellant's speech is legitimate commercial speech, which is protected by the first amendment.

Likewise, I have no difficulty in concluding that the government interests furthered by these restrictions are substantial. The most obvious of these interests is the protection of consumers from overreaching and high pressure sales tactics of this most unique product. W.Va. Code § 47-14-10(e) (1983). Directly speaking, the subject of these contracts is funeral arrangement; indirectly speaking, their subject is death—the death of the buyer, or one close to him. This topic is obviously one charged with emotion and one fraught with the potential for overreaching by solicitors. In promulgating the funeral rule, FTC noted that the extremely sensitive nature of this subject in part necessitated its regulation:

> While the arrangement of a funeral is clearly an important financial transaction for consumers, it is a unique transaction, one whose characteristics reduce the ability of consumers to make careful, informed purchase decisions.

47 Fed. Reg. 42260 (Sept. 24, 1982). Similarly, the West Virginia legislature has found these contracts so troublesome that by law they are void unless drawn to the legislative specifications. W.Va. Code § 47-14-1 (1983). I concur that in regulating the sales of these contracts the protection of consumers is a substantial state interest.

An equally substantial interest underlying this statute is the protection of the privacy of the home. *Project 80's supra*, at 596; *Curtis, supra*, at 1299-1300. The Supreme Court has recently reiterated its willingness to preserve the sanctity of the private home:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "preserving the sanctity of the home, the one retreat to which men and women can repair to escape

> from the tribulations of their daily pursuits, is surely an important value."

Frisby v. Schultz, ____ U.S. ____, ____ 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988) (citations omitted). While I cannot improve on this eloquent defense of the home, I must add that in this context, the solicitation for the funeral arrangements of the individual or a family member, appellant's speech is particularly intrusive. The discussion of the death of a family member can be a disquieting experience when done with a loved one, let alone when done with a perfect stranger who uninvitedly knocks on your door, or calls on your phone. I believe that West Virginia's ban on solicitation is supported by the substantial interest of protecting privacy.

The next inquiry is whether this ban directly advances these interests. The potential for fraudulent overreaching in the sale of these contracts is at its greatest when the consumer is confronted by a salesman:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effort of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking. . . .

Ohralik, supra, 436 U.S. at 457, 98 S.Ct. at 1919 (discussing solicitation by attorneys).[11] And, as the Supreme Court has recently noted, in-person solicitation is "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and out-right fraud." *Shapero v. Kentucky Bar Assoc.*, ____ U.S. ____, ____, 108 S.Ct. 1916, 1922, 100 L.Ed.2d 475 (1988) (attorney solicitation). Thus, I believe the statute clearly advances both of the state's legitimate interests

[11] My reliance on *Ohralik* and other attorney solicitation cases should not be taken as an indication that I do not appreciate the distinction between typical commercial solicitation and attorney solicitation. However, I believe that the unique nature of the product in this case, makes these attorney cases closely analogous. In both, an advocate trained in the art of persuasion is trying to convince an emotionally vulnerable layperson that he needs professional services.

insofar as it bans door-to-door solicitation. *See May v. People*, 636 P.2d 2 (Colo. 1981) (en banc).[12]

Likewise, I am persuaded that the state's prohibition of telemarketing furthers its interests. This conclusion is reached upon consideration of the three aspects of in-person solicitation that the Supreme Court recently found troublesome in *Shapero*.[13]

The first of these is that personal solicitation is inherently more difficult to regulate. This is so because the solicitation is "not visible or otherwise open to public scrutiny," *Id.* _____ U.S. at _____, 108 S.Ct. at 1922, thus making it nearly impossible for the state to keep tabs on its content. In contrast, written solicitations are much more easily regulated because the sales pitch is preserved in the advertisement itself. *Id.* Plainly, telemarketing is similar to in-person solicitation in this regard and poses the same threat of undetectable fraudulent and deceptive sales practices.

The second problematic aspect of personal solicitation is that it presents a much greater threat of overreaching or undue influence because of "the coercive force of the personal presence of a trained advocate." *Id.* Clearly, a salesman's presence over the telephone is less persuasive than it is in person, but just as clearly, it is more persuasive than a written solicitation. A written solicitation cannot adapt to a consumer's responses, it cannot change its sales pitch to exploit particular vulnerabilities, and it cannot press the reluctant buyer. Thus, although the opportunities for overreaching in telemarketing are not as great as they are in door-to-door solicitation, they are certainly greater than those present in direct mail or other advertising.

Finally, in-person solicitations may be appropriately regulated because of their invasion of a consumer's privacy. While this reason was certainly alluded to by the *Shapero* court, *Id.*, it was articulated more artfully in the *Ohralik opinion*:

> Unlike the reader of an advertisement, who can "effectively avoid further bombardment of [his] sensibilities simply by

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[12]The fact that W.Va. Code § 46A-2-132 (1983) also provides protection to consumers by allowing unilateral cancellation of in-home sale contracts does not diminish this conclusion. The West Virginia legislature can certainly provide extra protection to its citizenry in the sale of this unique product.

[13]As this discussion makes clear, my reasoning concerns telemarketing performed by salespersons. I have not considered the issue of whether telemarketing performed by an automated message player would pose the same risks.

> averting [his] eyes," the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning.

Id. 436 U.S. at 466, n. 25, 98 S.Ct. at 1923, n. 25.

Unlike direct mail solicitations that can be readily distinguished and easily discarded, a recipient of telephone solicitation must answer the phone to determine who is calling, and must risk an uncomfortable confrontation to rid himself of the solicitor. Further, it is beyond dispute that this most sensitive product makes an uninvited telephone call even more upsetting, especially when it invades the privacy of the home. In the words of one commentator, "[t]he telephone is an instrument with a unique capacity to intrude. Note, *Give Me A Home Where No Salesmen Phone; Telephone Solicitation and the First Amendment*, 7 Hastings Const. L.Q. 129. Thus, like in-person solicitation, telemarketing poses a very real threat to the privacy of a consumer's home. Consequently, because I conclude that telemarketing is in many ways analogous to in-person solicitation, I believe that the state's prohibition of it furthers the state's interests.[14]

I turn to the last step of the analysis, the determination of whether the statute sweeps more broadly than necessary to achieve the state's interests. The *Central Hudson* Court phrased this inquiry as whether the statute is more extensive than necessary to serve the state interests. *Id.* 447 U.S. at 566, 100 S.Ct. at 2351. Other circuits have interpreted this phrase to mean that before a statute can pass first amendment muster, it must be the least restrictive alternative to the state. *Project 80's, supra* at 596-97; *Fox v. Board of Trustees*, 841 F.2d 1207, 1213-14 (2nd Cir. 1988) *cert. granted*, _____ U.S. _____, 109 S.Ct. 52, 102 L.Ed.2d 31 (1988). I disagree.

Such a rigorous interpretation is not supported by the type of speech in issue. If this statute restrained speech concerning "core" first amendment matters, this "least restrictive alternative" standard would be appropriate. This statute, however, regulates purely commercial speech, speech not worthy of the first amendment's fullest protection. *Ohralik, supra*, 436 U.S. at 456, 98 S.Ct. at 1918; *Posadas, supra*, 106 S.Ct. at 2976

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[14] I reject appellant's contention that because other salesmen are allowed to solicit at private residences, this statute's limited proscriptions cannot possibly further the state's interests in any significant way. Rather, it is obvious that West Virginia's limited prohibitions reflect that its legislature acted in a way respectful of the balancing of interests necessary whenever freedom of expression is limited. It attempted to regulate only those solicitations that it has determined to pose the greatest threat to its legitimate interests.

(a "limited form" of protection). In commercial matters, an area traditionally subject to government regulation, *Virginia Pharmacy, supra*, 425 U.S. at 771 n. 24, 96 S.Ct. at 1830 n. 24, more deference is due the legislature than this stringent level of review allows. *Posadas, supra*, 478 U.S. at 343-44, 106 S.Ct. at 2978-79. This reasoning is especially appropriate in this case, where the commercial speech concerns a matter that the state legislature has comprehensively regulated as a threat to the consuming public. Therefore, in review of this statute, I do not believe that courts should engage in a speculative search for the least restrictive alternative. Rather, a provision should be upheld as long as the state has chosen a reasonable means of regulation that is not excessive in view of its legitimate interests. *See American Future Systems v. Pa. State Univ.*, 752 F.2d 854, 865-66 (3rd Cir. 1984), *cert. denied*, 473 U.S. 911, 105 S.Ct. 3537, 87 L.Ed.2d 660.

In making this determination, a court should view the anti-solicitation statute as a whole. West Virginia has demonstrated that two substantial interests underlie this statute, the protection of its people from fraud and the protection of its people's privacy. To further these interests, the legislature has restricted appellant's speech in a few specific situations that it identified as particularly prone to these problems—when the consumer is in a hospital, in a nursing home, confronted by the death of a loved one, or in the privacy of his own home. W.Va. Code § 47-14-10 (1983). Similarly, the legislature has prohibited only two limited forms of speech that it felt posed special threats to the state's interests—uninvited in-person solicitation and telemarketing. Out of this scheme, appellant challenges only the state's restraint on in-home solicitation. I find it to be constitutional.

In making this finding, I place great weight on the alternatives left open by the statute:

> (b) Notwithstanding any other provision of law to the contrary, nothing in this article shall be construed to restrict the right of a person to lawfully advertise, to use direct mail or otherwise communicate in a manner not within the above prohibition of solicitation or to solicit the business of anyone responding to such communication or otherwise initiating discussion of the goods or services being offered.
>
> (c) Nothing herein shall be construed to prohibit general advertising.

W.Va. Code § 47-14-10 (1983).

Thus, the statute does not totally insulate the private residence from

appellant's speech. With all of these avenues of communication left open, it would be difficult to conclude that the statute's measures are excessive.[15] Furthermore, the avenues left open confirm that the statute is narrowly drawn, to eliminate no more than the evils it seeks to remedy—fraud and invasion of privacy. *Frisby, supra*, _____ U.S. at _____, 108 S.Ct. at 2502. And, while I agree with appellant that West Virginia's statute implicates appellant's first amendment rights, this implication is even more minimal than would be other restraints on its speech because personal solicitation "is a business transaction in which speech is an essential *but subordinate* component." *Ohralik, supra*, 436 U.S. at 457, 98 S.Ct. at 1919 (emphasis added). Therefore, I conclude that this statute's proscriptions are not excessive. See *May, supra*, (ban on all commercial door-to-door solicitation found not excessive).

This conclusion is easily reached in view of the important state interests present in this case. The West Virginia legislature has determined that the speech in question poses a serious threat of fraud and overreaching to its citizenry. W.Va. Code § 47-14-10(e) (1983). The Supreme Court has made it clear on several occasions that when a form of commercial speech is subject to abuse, a state may act to regulate. *Posadas, supra; In re R.M.J., supra; Ohralik, supra; Friedman v. Rodgers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979).[16] Likewise, it is axiomatic that it is well within a state's police powers to act in protection of the privacy of the home. As another court has remarked: "when the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Curtis, supra*, at 1300. Likewise, I refuse to consign the privacy of the home to the second chair.[17]

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[15]Appellant again argues that these alternatives are not viable because they cannot be exploited profitably. This argument must be dismissed because it is not supported by the evidence. *See* n. 7, *supra*.

[16]Thus, my reasoning in this case is distinguished from the line of authority, exemplified by *Project 80's, supra*, which has invalidated blanket prohibitions of all door-to-door commercial solicitation. These cases have properly focused on the informational aspect of solicitation, i.e. that the disbursement of legitimate commercial information is essential in a free enterprise economy. The conclusions I have reached do not undercut this principle. I propose doing nothing more than upholding the restriction of a particular form of advertising that has been found to be potentially misleading.

[17]My reasoning is not in conflict with *Optimist Club of North Raleigh, N.C. v. Riley*, 563 F.Supp. 847 (1982), or *Planned Parenthood League v. Attorney General*, 391 Mass. 709, 463 N.E.2d 55 (Mass. 1984). In both cases, the court struck down blanket prohibitions on all charitable solicitation made by paid telephone operators. Here, the issue is commercial, not charitable speech, thus, less protection is due. Further, this is not a blanket prohibition of all commercial telemarketing, rather it is the prohibition of one type of solicitation particularly amenable to abuse.

I conclude my discussion by observing that this presents a textbook case of the appropriate restraint of commercial speech. The state legislature has determined a mode of commercial speech to be inherently troublesome and has acted in a reasonable way to remedy these troubles. It imposed limited restraints on speech while preserving appellant's ability to advertise its product. Finally, the statute is necessitated by legitimate, important state interests. Thus, I cannot conclude that it offends the first amendment.

V.

In sum, we unanimously hold that West Virginia's statute is not preempted by the FTC's Funeral Rule. A majority of the panel also concludes that its provisions do not violate the first amendment. Therefore, the district court is affirmed.

AFFIRMED.

KISER, District Judge, concurring:

I concur with the results reached by Judge Hall and in his opinion except as to his analysis of the First Amendment issue.

I write separately to point out that determining whether a regulation is aimed at the content of speech or the time, place, or manner in which speech is delivered is no easy task. In this case, unlike Judges Hall and Butzner (in his dissenting opinion in *Guardian Plans*), I think the regulations come down on the side of time, place, and manner. As Justice Stevens observed, "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.' " *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 544-45, 100 S.Ct. 2326, 2337-38, 65 L.Ed.2d 319 (1980) (Stevens, J., concurring). Sometimes it is the very content of the speech that makes it inappropriate in a particular time or place. A student can talk about the World Series *after* history class.

Both state and federal governments have determined that the funeral industry needs regulating to prevent deceptive practices. In an industry where regulation is both appropriate and necessary, the government may have a strong interest in regulating speech. For example, speech is necessarily a part of many sales transactions. Regulation of certain speech may be an essential part of a government regulation scheme for an entire industry.

Commercial speech, like other speech, is subject to reasonable time, place, and manner restrictions that serve a significant government interest and leave open ample alternative channels of communication. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). Some time, place, and manner restrictions may be directed at speech on a particular topic, and yet such regulations are not necessarily "content-based." For example, the Supreme Court found that a restriction on the location of adult theaters was not content-based, because the regulation was aimed at the secondary effects of the theaters on the surrounding community. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986).

The regulation of lawyers' solicitation provides a natural analogy to the regulation of funeral directors' sales pitches. Both situations offer the potential for trained professionals to overwhelm the unwary consumer. The Supreme Court has permitted the states to ban in-person soliciting by lawyers because of the special dangers presented by such speech. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 457, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978). Even though the ban on soliciting was aimed solely at lawyers, the Court did not subject the regulation to the rigorous scrutiny required for the content-based regulation. In fact, the Court held that such regulations required *less* scrutiny:

> In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.

Id. at 457, 459, 98 S.Ct. at 1919, 1920. That the regulation of speech in *Ohralik* was permissible under a time, place, and manner analysis becomes even more apparent when it is compared with *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). In *Bates*, Arizona sought to ban lawyer solicitation through advertising media. The Court struck down Arizona's regulation as being too broad but left open the question of whether a state could ban in-person solicitation. Then, in *Ohralik*, the Court addressed the question of in-person solicitation and found that a state's ban on this method of advertising was permissible. In both cases, the state regulations were aimed at lawyer solicitation of prospective clients, but the deciding difference was the manner of solicitation which was forbidden. From a comparison of these

two cases, it seems to me that reasonable regulations governing the time, place, and manner of advertising by members of a regulated profession will not be subject to the heightened scrutiny applied to content-based regulations.

In my view, the West Virginia regulations are a permissible time, place, and manner restriction on the speech of funeral directors, a necessary part of a general scheme for regulating the funeral industry. As Judge Hall notes, the regulations leave open ample alternative channels of communication. If the regulations had banned *all* in-person soliciting in order to end abuses in the funeral industry, the regulations undoubtedly would be struck down as being too broad. *Cf. United States v. Kokinda*, 866 F.2d 699, 706 (4th Cir. 1989). On the other hand, a more narrow regulation simply could not be an effective means of combatting the potential abuses of in-person solicitation. *See Ohralik*, 436 U.S. at 466, 98 S.Ct. at 1924. Thus, the West Virginia regulations are narrowly tailored to serve the significant state interest of preventing abuses in the funeral industry. I believe the regulations should be upheld as a valid time, place, and manner restriction.

BUTZNER, Senior Circuit Judge, concurring in part:

I concur in Part II of the court's opinion which holds that the Federal Trade Commission's Funeral Rule does not preempt W.Va. Code § 47-14-1, *et seq.* (1983). I also concur in Part II n. 6 which holds that the district court properly rejected the claim that the statute violates the due process and equal protection clauses of the fourteenth amendment because it requires that 90% of the payments made for preneed contracts be placed in trust. In view of these rulings, it is unnecessary to decide whether the statute also infringes rights secured by the first and fourteenth amendments with respect to solicitation and telemarketing. Consequently I do not concur in Parts III, IV, and V.

National Funeral Service principally complains about the requirement for placing 90% of preneed contract payments in trust. The company's president testified that with overhead expenses of 35%, the 90% trust requirement made it impossible for the company to operate. He explained that even if there were no prohibition against solicitation, the company would be unable to conduct its business. The president's testimony is the basis of the litigation position that is stated in the company's brief:

> West Virginia Code § 47-14-5 further requires the trusting of ninety percent (90%) of all funds collected under the contract at the time when the funds are collected. This provision effectively allows only ten percent (10%) of the

> gross contract price for overhead, sales, and other current expenses including commissions to salespeople. Such a high trusting percentage effectively (and the Appellant submits intentionally) ceased the sale of preneed funeral contracts in the State of West Virginia. The minimal percentage permitted to be retained for the purposes of meeting sales, overhead, and other expenses totally precludes the operation of any large scale preneed sales organization and effectively stopped price and product competition and the dissemination of price and product information by preneed funeral sellers.
>
> * * * * * * * * *
>
> The Appellant has been forced to ceased all business operations and has in fact not sold any further preneed funeral goods or services under preneed contracts in the State of West Virginia since the implementation of West Virginia Code § 47-14-1.

Appellant's Brief pp. 6 and 7. At oral argument National Funeral Service insisted that it wanted a decision on its claim that the statute violated the first amendment. But it never retracted its position, unequivocally expressed by testimony and brief, that the trust requirement, without regard to the ban on solicitation, precluded it from doing business in the state.

Inasmuch as the company finds itself unable to conduct its business because of the trust requirement, the controversy over other provisions of the statute is mooted. This is so even though the district court found that the statute did not preclude companies from engaging in preneed business. Even if we were to decide the other issues in favor of National Funeral Service, our decision would be of no practical consequence to it, for in testimony and brief it has asserted in unmistakable terms its litigating position. In the context of this case, our views about telemarketing and other means of solicitation have only the academic significance of an advisory opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GUARDIAN PLANS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	87-0676-R
JOSEPH W. TEAGUE, *et al.*,	)	
	)	
and	)	
	)	
VIRGINIA FUNERAL DIRECTORS ASSOCIATION	)	
	)	
	)	
Defendants.	)	

JUDGMENT ORDER

For the reasons stated from the bench which, if necessary, will be elaborated upon and reduced to a memorandum, it is ADJUDGED, ORDERED and DECREED that the Complaint filed herein be and the same is hereby DISMISSED.

Since this is a final judgment, defendants are entitled to their taxable costs.

Let the Clerk send a copy of this order to all counsel of record.

Robert R. Merhige, Jr. /S/

UNITED STATES DISTRICT JUDGE

Date APR 28, 1988

UNITED STATES CONSTITUTION

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

§ 54-260.74. Refusal, suspension or revocation of license; offenses.—Whenever the Board shall have reason to believe that any person to whom a license has been issued has become unfit to practice within the funeral service profession, or has violated any of the provisions of this chapter or any rule or regulation of the Board, or whenever written complaint charging the holder of a license for the practice of funeral service with the violation of any provision of this chapter is filed with the Board, the Board shall be governed by the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.).

The Board may also refuse to issue or may refuse to renew or may suspend or may revoke any license or may place the holder thereof on a term of probation after proper hearing upon finding the holder of such license to be guilty of acts or omissions including the following:

(2) Unprofessional conduct which is hereby defined to include—

(a) Misrepresentation or fraud in the conduct of the funeral service profession, or in obtaining or renewing a license;

(b) False or misleading advertising as the holder of a license for practice of funeral service;

(c) Solicitation of dead human bodies by the licensee, his agents, assistants or employees, whether such solicitation occurs after death or while death is impending; providing, that this shall not be deemed to prohibit general advertising;

(d) Employment by the licensee of persons known as "cappers," or "steerers," or "solicitors," or other such persons to obtain the services of a holder of a license for the practice of funeral service;

(e) Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment;

(f) The direct or indirect payment or offer of payment of a commission by the licensee, his agents, or employees for the purpose of securing business;

(g) Gross immortality, including being under the influence of alcohol or drugs;

(h) Aiding or abetting an unlicensed person to practice within the funeral service profession;

(i) Using profane, indecent or obscene language within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;

(j) Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any crematory, mausoleum or cemetery;

(k) Violating or cooperating with others to violate any of the provisions of this chapter or of the rules and regulations of the Board;

(l) Violation of any state law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies;

(m) Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to the custody thereof;

(n) Knowingly making any false statement on a certificate of death;

(o) Violation of any provisions of Chapter 5 (§ 11-24 et seq.) of Title 11 and Chapter 7 (§ 32.1-249 et seq.) of Title 32.1 of the Code of Virginia or rules and regulations which the Board may adopt.

(p) Failure to comply with § 54-260.71:1, and to keep on file an itemized statement of funeral expenses in accordance with rules and regulations which the Board may adopt.

Virginia Board of Funeral Directors and Embalmers
Rules, Regulations and By-Laws
(Effective January 12, 1983)

Article XVI

SUSPENSION AND REVOCATION OF LICENSES

1. Grounds for Revocation or Suspension. Any license issued by the Board may be revoked or suspended by the Board.

(e) If the holder engages in any illegal advertising or in the unlawful solicitation of employment.

Article XVIII

FAIR TRADE PRACTICES

1. Solicitation. Business should not be solicited, directly or indirectly, by any means other than by legitimate advertising not forbidden by law or these rules. The offering or making of any payment or allowance or rebate, refund, commission, gratuity, credit, unearned discount or excess allowance as an inducement to employment shall be deemed improper solicitation. The offer or payment of money or other valuable consideration to any burial association, person, firm or corporation for the purpose of producing or procuring business shall be deemed improper solicitation. No person engaged in any manner in the care and disposition of the dead shall organize, promote, participate in or be a party to any enterprise, plan or scheme that restricts or has for its purpose the restriction of the freedom of choice in the open market of a person or persons having the legal right of such choice regarding contracts, purchases, or arrangements with reference to any part of a funeral service, or interferes with free and open competition in this Commonwealth or imposes upon the public in any manner.

Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GUARDIAN PLANS, INC. *et al.*,
Petitioners,

v.

JOSEPH W. TEAGUE, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Circuit's decision that Virginia may prohibit uninvited telephone solicitation to older consumers in their homes for the sale of funerals, when ample other means of promotion are permitted, is worthy of review?

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STATEMENT OF THE CASE

The Commonwealth of Virginia regulates the practice of the funeral service profession by statute and through a regulatory board, the Board of Funeral Directors and Embalmers ("the Board"), whose members include licensed funeral directors and consumer representatives. The Board promulgates and enforces regulations governing licensure and professional standards for the practice of the funeral profession in Virginia.

Virginia's regulations include restrictions upon commercial promotion of funerals for both at-need and pre-need funeral planning. While § 54-260.74(2) of the Virginia Code and Board regulation (Article XVIII of Board Regulations) prohibit personal solicitation of funeral services, other forms of advertising are permitted. The ban on personal solicitation is designed to reduce the opportunities for fraud or overreaching and to respect consumer privacy in the sensitive and emotional matters involved in funeral planning.[1]

Petitioner Guardian Plans, Inc. ("Guardian") is a corporation whose agents market the Guardian Plan© ("the Plan"), an insurance funded pre-arranged funeral program. Petitioners Tharp and Rogers are Virginia licensed funeral directors who allege that they are aggrieved by the ban on solicitation. Both operate funeral homes which sponsor the Plan. Respondents are members of the Board, the Director of the Virginia Department of Health Professions (formerly Department of Health Regulatory Boards) and the Virginia Funeral Directors Association ("VFDA"), which intervened as a party defendant at the trial level.

Guardian markets the Plan to consumers in Virginia by "sales counselors" and telemarketers, who are generally not qualified by education or license to practice the funeral profession in Virginia. Sales counselors are licensed to sell life insurance and annuities, which are the funding vehicles for the Plan. Guardian telemarketers are trained only in techniques of persuasion by telephone; they are neither trained nor licensed to sell insurance or to practice the funeral profession.

Guardian promotes its Plan in Virginia by print and broadcast media, by direct and targeted mailings, and , prior to the decision in this case, by telemarketing to private homes. Guardian mails promotional pamphlets for the Plan to targeted consumers, using purchased lists of individuals selected by zip code and age. This targeted group consists of

---

[1] Contrary to Petitioners' assertions, these legitimate state interests underlying the regulation were articulated by members of the Board at trial.

persons aged 50 or above living in zip code areas near the funeral homes which endorse (and ultimately provide the funerals arranged pursuant to) the Plan.

Guardian's promotional pamphlet invites consumers to obtain additional information about the Plan by returning a postage-paid response card. Those targeted consumers who do *not* respond to the mailer received "follow-up" telephone calls in their homes from Guardian phone solicitors, who tried to persuade them to accept a home visit by a Guardian sales counselor.

During a home visit, the Guardian sales counselor tries to arrange a funeral for his prospect, selling life insurance or annuity contracts to fund it. The sales counselor has been trained to give a structured sales presentation using a variety of "closing techniques" designed to remove objections to the sale. If he is successful in his sales pitch, he arranges all details of the consumer's funeral. The sum total of the prices of the funeral goods and services selected determines the amount of death benefit of the insurance policy. Next, the consumer signs a revocable assignment of death benefit to Guardian, which then forwards the contract papers to the sponsoring funeral home. Upon the death of the consumer, the funeral home provides the funeral in return for the insurance proceeds.

Guardian's marketing and funeral arrangement scheme prompted an investigation by the Board into whether Guardian was violating Virginia law by engaging in personal solicitation of Virginia consumers for its pre-need funeral program and by using employees unlicensed in the funeral profession to arrange funerals.

Petitioners challenged the Board's position on solicitation and licensing on constitutional grounds in federal court, losing at both trial and appellate levels. The issue raised by this petition is whether this Court should review the Fourth Circuit's decision finding that the Virginia ban on telephone solicitation for pre-need funerals is permissible under the First Amendment and that the Virginia law mandating that ban is not unconstitutionally vague.

SUMMARY OF ARGUMENT

Petitioners do not raise any significant issue which has not already been addressed by this Court. The lower courts correctly decided the constitutional issues in applying the four-part test applicable to commercial speech articulated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Indeed, the appellate court's rejection of Petitioners' argument that the ban on solicitation be judged by the "least restrictive alternative" accords with a recent decision of this Court. Another recent decision of this Court renders immaterial the issue whether the Virginia statute should be viewed as a content-based restriction on commercial speech or as a content-neutral "time, manner and place" restriction.

There can be no rigid formula for the state's evidentiary burden in defending a particular restriction upon commercial speech. Each form of commercial speech is unique; because of the inherent dangers of some forms of communication, the state may support a restriction with little or no formal evidence. Moreover, in this case, Respondents presented evidence that Guardian's solicitation threatened abuse of targeted consumers. The prohibition of that solicitation is a reasonable regulation narrowly tailored to eliminate that threat while permitting Guardian to use other means of promoting its product.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Petitioners Fail to Raise Any Significant Issue Which Has Not Been Addressed by this Court

This petition should be denied for the simple reason that it raises no significant constitutional issue that has not been already addressed by this Court. Petitioners asked the appellate court to reconsider its ruling approving the ban on solicitation because of a disagreement among the judges: two upheld the restriction on different legal grounds and the third dissented. Judge Hall found the ban acceptable under the *Central Hudson* analysis applicable to content-based restrictions upon commercial speech. Judge Kiser, concurring in the result, found the ban valid under a "time, place and manner" analysis. Judge Butzner dissented.

The disagreement between Judges Hall and Kiser concerning the appropriate analytical model is immaterial in light of this Court's very recent decisions in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879, No. 88-226 (June 22, 1989), and *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, No. 87-2013 (June 29, 1989). *Ward* involved a challenge to a governmental "time, place or manner" restriction on public rock music concerts, while *Fox* concerned a content-based restriction upon commercial speech.

In both cases, the Court found that it was unnecessary for the government to select the least restrictive alternative; this standard is

required only for prohibitions applicable to non-commercial speech. Furthermore, the standards of judicial review in *Ward* (for time, place and manner restriction) and *Fox* (for commercial speech) are indistinguishable: the restriction must be narrowly tailored to promote legitimate governmental objectives, but need not be the least restrictive means of accomplishing those objectives. Because the two standards are virtually identical, whether Virginia's restriction on commercial solicitation of funerals is "content-based" or "content-neutral" is immaterial.

Guardian also argued to the Fourth Circuit that its panel erred in not adopting the "least restrictive means" analysis to the Virginia solicitation ban. *Fox* removes any doubt of the correctness of the appellate court's choice for the appropriate standard of review.

After *Ward* and *Fox*, Petitioners have no legitimate issue worthy of review. Thus, they now must manufacture such issues, described as follows:

> (1) What factors are used in determining if a restriction on commercial speech is content-based or content-neutral?
>
> (2) What evidence must a state present to justify a content-based prohibition on truthful commercial speech?
>
> (3) To what extent does the First Amendment protect telemarketing, which is an increasingly common means of disseminating commercial information, but which the Court has never addressed?
>
> (4) How do the First Amendment principles governing lawyer solicitation or door-to-door solicitation apply to this form of marketing?

(Petition at p. 2).

The first "issue" is immaterial in the context of commercial speech as discussed above. Furthermore, it has been addressed repeatedly by this Court. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There is no confusion about the relevant factors to be considered in determining whether a regulation is "content-based"; there is only disagreement about how those factors apply to particular facts.

The second issue is also a "non-issue," because there can be no rigid formula for the state's evidentiary burden to defend its restrictions on commercial speech; there are too many variables, including the type and manner of speech, strength of the state's interests and availability of

alternatives. As this Court noted in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981):

> each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method.

The decision of this Court in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (upon which both the trial and appellate courts relied heavily in this case), illustrates this point.[2] In *Ohralik*, Ohio successfully defended its ban upon lawyer solicitation without showing any actual harm from such solicitation. The Court, in effect, took judicial notice of the potential for overreaching and misconduct inherent in personal solicitation, particularly of vulnerable consumers, and ruled that the state could take prophylactic measures. By contrast, the Court held that the state had not met its burden to show that a regulation was sufficiently "narrowly tailored" in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. ____, 108 S.Ct. 1916 (1988), where mailed advertisements for legal services were banned. While the state's evidentiary burden varied in these cases, the standard for reviewing the restrictions did not.

Judicial approval of prohibitions against telemarketing of funeral services does not represent a threat to telemarketing generally. As the appellate court found, the ban on Guardian's telemarketing is justified because of (a) the potential for overreaching inherent in personal telephone solicitation for funeral planning, a unique topic which "is obviously one charged with emotion and one fraught with the potential for overreaching by solicitors" (Appendix to Petition at C-10) and (b) the "substantial interest of protecting privacy" in matters so personal and disquieting as one's death (Appendix to Petition at C-11). Only funeral solicitation is affected by these cases, not telemarketing *per se*.[3] Accordingly, Petitioners are wrong to suggest that this case creates the need for the Court to address the First Amendment's application to telemarketing.

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[2] Petitioners try to avoid the impact of *Ohralik* by suggesting that it is limited to regulation of the legal profession (Petition at 12). This contention is belied, of course, by the frequent citation of *Ohralik* by this and lower courts in other First Amendment decisions.

[3] As Petitioners note, Virginia does not restrict telemarketing for other commercial purposes. Funeral solicitation has been singled out because of its particular potential for harm.

Similarly, Petitioners' argument that the Court should spell out the relationship between lawyer solicitation, charitable solicitation and telemarketing misses the point. Each case involving the First Amendment is unique. The restrictions on lawyer solicitation in *Ohralik* reflect an appropriate balance between the potential for harm to the consumer and the speaker's right to communicate. A similar balancing analysis was made in this case, and in every First Amendment case. The legal principles applied in this balancing process are now well-established and this case raises no new issue requiring further clarification.

To compare "lawyer solicitation" cases with "charitable solicitation" cases or "funeral solicitation" cases is not particularly helpful for purposes of First Amendment analysis. *Ohralik* is important precedent for these funeral solicitation cases not because of similarities between the regulation of lawyers and funeral directors, but because the underlying concerns justifying the result in *Ohralik* are applicable herein. Both cases involve purely commercial speech that is inherently conducive to abuse (personal contact by skilled solicitors of consumers susceptible to overreaching). Furthermore, in each case, there are alternative, less intrusive means of conveying the same commercial message.

Significant for First Amendment review are general guiding principles, such as the means by which particular speech is determined to be "commercial" or "political", and the criteria by which limitations upon each category of speech are to be judged. *Central Hudson* provides the four-prong test by which restrictions upon *all* commercial speech are to be judged. *Fox* simply refines that test by adding clarity to the meaning of the fourth prong of that test (the "narrowly tailored" requirement). Nothing in this case suggests that any further refinement of the *Central Hudson* formulation is needed.

2. The Majority Opinion of the Fourth Circuit Court of Appeals Applied the Correct Legal Analysis in Sustaining Virginia's Right to Prohibit Personal Solicitation of Pre-need Funerals

The Fourth Circuit Court of Appeals upheld the Virginia statute by comparing it to a nearly identical restriction on pre-need funeral solicitation of a West Virginia statute in the companion case of *National Funeral Services v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989). The appellate court's review of both statutes followed the four-prong test of *Central Hudson*. The court, although finding that (1) Guardian's

commercial speech was entitled to some degree of First Amendment protection, also determined that (2) the state's interest in banning pre-need solicitation was substantial; (3) the ban furthered those interests; and (4) the ban was narrowly tailored in proportion to those interests.

In applying the fourth prong of *Central Hudson*, the appellate court rejected Petitioners' argument that it must use the "least restrictive means" standard. Instead, the court upheld the statutes on a finding that they represented "a reasonable means of regulation that is not excessive in view of [the state's] legitimate interests." (Appendix to Petition at C-14). This analysis is consistent with that approved by this Court in *Fox*: a restriction must be narrowly tailored in proportion to the interest served, but need not be a "perfect fit." 57 U.S.L.W. at 5018. Because the appellate court applied the correct legal standard, its decision should not be disturbed.

3. The Record Herein Provides Ample Factual Support for the Prohibition of Guardian's Telemarketing Solicitation

Petitioners make the startling assertion that the Fourth Circuit did not cite any governmental interests served by the Virginia law. This statement is true only in the literal sense that the opinion in *Guardian Plans, Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989), did not address the Virginia statute separately from the West Virginia statute approved in the companion *National Funeral Services* case. No separate analysis was made of the Virginia law because the court found the two forms of solicitation (and related bans) so similar "there can be no principled analytical distinction." (Appendix to Petition A-7).

In *National Funeral Services*, the court identified as substantial the state's interests in consumer protection against fraud, overreaching and uninvited intrusions into the privacy of the home. The importance of these interests has been recognized in *Ohralik*,[4] wherein the Court approved a ban on personal, in-hospital solicitation by attorneys. The analogy is appropriate: in both situations, the opportunity for coercion inheres in the nature of the promotion—personal contact of a particularly vulnerable consumer by one who is trained to persuade. Because of Guardian's offering (funeral goods and services) and the age of its targeted consumers (over 50), the risk of overreaching is obviously greater than, for example, the selling of housewares to a homeowner.

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[4] This Court's recognition of the importance of the right to privacy in the home is evidenced in *Frisby v. Schultz*, ____ U.S. ____, 108 S.Ct. 2495 (1988).

Although the lower courts did not find it necessary to scour the record to identify these interests in *Guardian*, there was testimony from Board members identifying the reasons for the prohibition.[5]

Guardian also claims that there was "no credible evidence that telemarketing solicitation of pre-need funeral plans has or might coerce consumers" (Petition at 15), but the trial evidence shows otherwise. What is particularly suspect about Guardian's telemarketing is that it has no informational value. Guardian's telemarketers phone only those individuals who have received its informational brochure in the mail and who have chosen *not* to return its response card to ask for more information. They are, therefore, presumptively not interested in Guardian's product. The sole role of the telemarketers is to get a home appointment for a salesman, not to inform.[6] What the telemarketers are trained to do is to deflect consumers' objections to a home visit by a Guardian salesman. These and other selling techniques revealed in the record of this case amply support the restriction.

Moreover, Guardian is wrong again in implying that its telemarketing is harmless. Common sense suggests that telephone solicitation by persuasive telemarketers for funeral plans directed to consumers over 50 years of age has the same potential for abuse as that identified in *Ohralik*. The record supports that conclusion.

At trial, Respondents introduced Virginia consumer letters (from Guardian's files) demonstrating possible overreaching by Guardian's telemarketing. One letter is from a daughter of an elderly and mentally incompetent woman who "purchased" the Plan. Others claim or imply that Guardian representatives misled them.[7] The record shows that Guardian's telemarketing raises valid concerns and is appropriately subject to state regulation.

The next issue under *Central Hudson* is whether the challenged regulation furthers the state's interests. There is no question that the prohibition of telemarketing furthers the state's interest in protecting consumers from overreaching and unwanted intrusions into the privacy of their homes: elimination of the phone calls (which, as in *Ohralik*, are

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[5] For example, Susan Modlin, a consumer member of the Board, testified the ban was necessary because discussion of funerals raises personal and emotional issues which can render the consumer subject to manipulation. (Joint Appendix filed with the appellate court, Tab 16 at 204).

[6] Guardian trains its telemarketers to "never tell the prospect too much. Give the person just enough information to get the appointment. Questions will be answered by the counselor." (Defendants' Trial Exhibit 14 filed under protective order.)

[7] Consumer complaint letters appear at Joint Appendix, Tabs 58-61, at 727-31.

not subject to public scrutiny) removes the potential for abuse inherent in such telemarketing.

The final prong of the *Central Hudson* analysis requires the restriction to be narrowly tailored to serve the state's interests. Guardian promotes its Plan in other ways, free of state regulation, using both print and broadcast media and targeted mailings. There is no indication that these means of promotion are ineffective. Furthermore, as in *Ohralik*, there is simply no feasible means of policing personal solicitation short of a ban. Accordingly, the lower courts appropriately found the prohibition of telemarketing to be within the state's authority. Common sense, human experience and evidence in the record combine to provide ample factual support for the appellate court's decision.

4. Virginia's Statutory Ban on Pre-Need Funeral Solicitation is Not Unconstitutionally Vague

As the majority opinion of the appellate court noted, Petitioners themselves provide the best defense to their argument that § 54-260.74(2) of the Virginia Code (the law which prohibits solicitation of funerals) is unconstitutionally vague. Their original complaint contained no hint of confusion about the meaning of the statute. In responding to a motion for abstention, Petitioners explicitly acknowledged their understanding that Guardian's solicitation was illegal:

> The statute rendering solicitation illegal (Va. Code § 54-260.70) is clear and unambiguous. There is *no* dispute about its meaning, and therefore abstention is completely inappropriate.

(emphasis in original) (*See* opinion below at Appendix to Petition, A-7, n. 5).

Any doubt concerning the legality of solicitation was dispelled by the 1989 Virginia General Assembly, which enacted § 54.1-2806(5) of the Virginia Code. That section explicitly prohibits both at-need and pre-need funeral solicitation.[8]

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[8] The 1989 Virginia General Assembly also answered Guardian's complaint of a lack of "legislative findings" to support the ban. In 1988, the Virginia General Assembly approved House Joint Resolution 50, which established a legislative subcommittee to study the laws related to pre-need funeral contracts and to recommend (among other

(Continued on next page.)

CONCLUSION

This petition raises no novel question of constitutional significance. Whatever conflicts which may have existed among the circuits have been resolved by several recent decisions of this Court further defining the scope of permissible state restrictions upon protected speech. The lower courts herein applied the correct legal standards to facts supported by the record.

Guardian's intrusive and uninvited solicitation for funeral goods and services by telemarketers to older consumers in their homes is entitled to little or no First Amendment protection. The Commonwealth of Virginia has substantial interests in suppressing the potential for abuse inherent in such solicitation, and in protecting the privacy of its citizens in their homes. Considering that Guardian can and does promote its product in other ways, the ban upon solicitation by telemarketers is narrowly tailored and does not offend the First Amendment. Accordingly, Respondents ask that this petition be denied.

Respectfully submitted,

MEMBERS, VIRGINIA BOARD
OF FUNERAL DIRECTORS &
EMBALMERS:

JOSEPH W. TEAGUE
FREDERICK R. M. CARTER
DAVID M. FARRIS
EMOGENE BENNETT
DONALD K. JONES
ERNEST L. MYERS
JOHN HARVEY GIVENS
DAVID L. BAILEY, JR.
SUSAN MODLIN HART

---

* *(Continued from previous page.)* things) whether the "solicitation of pre-need contracts [should] continue to be prohibited as provided in the present law?" That subcommittee presented its written report to the 1989 General Assembly in a document titled *Pre-need Contracts for Funeral Services* [House Document No. 52 (1989)]. The report unanimously recommended that the solicitation ban be retained and the law clarified. It recited consumer protection, particularly for elderly consumers, as a primary concern in regulating pre-need funeral contracts.

BERNARD L. HENDERSON, JR.,
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GUARDIAN PLANS, INC. *et al.*,
Petitioners,

v.

JOSEPH W. TEAGUE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONERS

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Dated: July 28, 1989

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Motion for Leave to File Brief as Amici Curiae in Support of Petitioners

Pursuant to Rule 36.1 of this Court's Rules, the American Cemetery Association and the Southern Cemetery Association ("Amici") move for leave to file their brief amici curiae supporting the petition for a writ of *certiorari*. This motion is necessitated by the refusal of all of the respondents to grant their consent for the amici to file this brief. All of the petitioners have granted their consent to the filing of this brief. The amici curiae brief, conditionally filed herewith, is annexed to the motion.

In the instant case, the Fourth Circuit has upheld as constitutional a Virginia statute which prohibits the dissemination of accurate information by telephone concerning the sale of funeral goods and services in advance of need (preneed), and which is not directed at any other products or services. Telemarketing of the exact type prohibited by the Virginia statute is a widespread practice in the funeral services industry among the members of Amici. The Fourth Circuit's decision has also provided impetus for similar preneed telemarketing prohibitions in other states. Due to the serious impact which the instant case threatens to have on their members, Amici respectfully request leave to file the attached brief amici curiae in support of the petition.

Dated: July 28, 1989

Respectfully submitted,

ROBERT M. FELLS
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IN THE

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v.

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On Petition for a Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICI CURIAE OF THE AMERICAN CEMETERY ASSOCIATION AND THE SOUTHERN CEMETERY ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE

The Fourth Circuit's opinion upholds as constitutional a Virginia statute which prohibits the dissemination of accurate information by telephone concerning funeral goods and services in advance of need (preneed), and which is not directed at any other products or services.

Amicus, American Cemetery Association (ACA), has approximately two thousand members composed of

cemeteries and combined funeral home-cemetery establishments throughout the United States. Amicus, Southern Cemetery Association (SCA), has approximately four hundred members composed of cemeteries and combined funeral home-cemetery establishments throughout the Southern United States. Telemarketing of the exact type prohibited by the Virginia statute is a widespread practice in the funeral services industry among the members of Amici. The Fourth Circuit's decision has provided impetus for similar preneed telemarketing prohibitions in other states. Amici contend that the decision will have a severe adverse impact upon the funeral services industry and on the public served by the industry.

SUMMARY OF ARGUMENT

Amici urge the Court to consider whether the Fourth Circuit erred in upholding a Virginia statute prohibiting the use of the telephone to convey accurate pre-sale information concerning funeral goods and services. The opportunity for such telephone communication is of great importance to the members of Amici and the state has available a host of less restrictive means to protect its citizens from abuse. Further, in its proper context, the issue is one having a nationwide impact.

The purchase of a traditional funeral and burial arrangement is the third largest expenditure many consumers will be required to make. When purchased at need, that is, when a death has occurred or is imminent, consumers are forced to make decisions involving thousands of dollars within limited time constraints and often in a state of emotional distress.

The pre-arranged or preneed purchase of funeral and burial arrangements allows consumers to avoid these pressures. In addition, preneed agreements are revocable by the purchaser in many states, have a three-day cancellation time period provided by federal law for in-home sales, and usually result in monetary savings for the consumer in the long-term. The Fourth Circuit itself has previously acknowledged that consumers desire pre-sale funeral information by telephone and that state legislatures cannot be relied upon to enact pro-competitive legislation since they are dominated by industry interests. The existing regulatory legislation in Virginia which was upheld by the Fourth Circuit forestalls the interplay of traditional forces in the market, resulting in a lack of price competition and information regarding products and services which consumers ultimately must acquire.

ARGUMENT

I. Introduction

During the 1970s and 1980s, the Federal Trade Commission (FTC) amassed a valuable and extensive record concerning funeral industry trade practices in conjunction with the development and promulgation of its Funeral Industry Practices Trade Regulation Rule ("Funeral Rule"), 16 CFR Part 453. While the provisions of the Rule are not at issue here, many of the FTC's findings and conclusions directly relate to the issues being presented for the consideration of this Court in the instant case. Furthermore, the court below explicitly acknowledged the extent of the FTC's investigation into funeral industry practices in *Harry*

and Bryant Co. v. FTC, 726 F.2d. 993 (4th Cir. 1984),[1] a case which challenged the validity of the Funeral Rule.

The Fourth Circuit upheld the Funeral Rule in *Harry and Bryant Co.* stating that the Commission had found substantial evidence to conclude that certain industry practices were unfair and misleading, including the lack of telephone information disclosure.[2] The court below recognized that "a large number of surveys show that the majority of consumers desire pre-sale information about the cost of funeral goods and services" (Id. at 999), that "widespread refusal to disclose price information (by telephone) was virtually conceded during the rulemaking by the National Funeral Directors' Association" (Id. at 1000, footnote 5), and that the FTC Presiding Officer and Commission staff concluded that "state regulation against deceptive funeral practices was dominated by industry interests." (Id. at 996).

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[1] "In response to the FTC's notice, more than 9000 documents, comprising in excess of 20,000 pages, were submitted by interested parties, including consumers and industry representatives. During the fifty-two days of hearings 315 witnesses testified. The witnesses also presented exhibits and underwent cross-examination by participating parties or the FTC's Presiding Officer. The hearings generated 14,719 pages of transcripts and approximately 4,000 additional pages of exhibits. Thereafter, another comment period was held for rebuttal of any materials previously admitted into evidence. Forty-seven rebuttal submissions were received." (Id. at 996).

[2] In so holding the Fourth Circuit cited this Court's ruling in *American Textile Mfrs. v. Donovan*, 452 U.S. 490, 522 (1981) [quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)] in characterizing the scope of the substantial evidence test when applied to rulemaking. (Id. at 999).

The FTC Final Staff Report on Funeral Industry Practices[3] found that "for many consumers, the telephone is the only medium available for ascertaining the price levels and offerings of different funeral homes. Access by telephone to such information is vital if funeral consumers are to have any meaningful opportunity to comparison shop." (Id. at 359-360, footnote omitted).

It is ironic that the Fourth Circuit would uphold a federal regulation **requiring** funeral homes to provide information by telephone on request in *Harry and Bryant Co.*, and then uphold a Virginia statute **prohibiting** funeral homes from initiating telephone calls which can provide the consumer with the exact same information. Amici do not take issue with the Fourth Circuit's concern for protecting the public from intrusive huckstering in the emotionally charged environment existing when a death has occurred or is imminent, the main characteristic of "at need" funeral purchases.

However, amici respectfully contend that the Fourth Circuit's apparent distinction between a required telephone disclosure and a voluntary telephone solicitation is based upon a failure to recognize the enormous differences between the "at need" funeral arrangement and a "preneed" or prearranged funeral plan. Amici are especially perplexed that the Fourth Circuit based its opinion in the instant case on its own analysis in a companion decision, *National Funeral Ser-*

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[3] Bureau of Consumer Protection, Federal Trade Commission, Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule (16 CFR Part 453), June 1978.

vices, Inc. v. Rockefeller, 870 F. 2d 136 (4th Cir. 1989), which likewise failed to distinguish between at need and preneed forms of solicitation.

II. The Characteristics of Making At-Need Funeral Arrangements Place Consumers at an Emotional and Financial Disadvantage

The FTC Statement of Basis and Purpose (47 Fed. Reg. 42260) issued in conjunction with the publication of the final version of the Funeral Rule discussed funerals pragmatically in terms other than religious and social rituals. The Commission found that a funeral was the third largest single expenditure that many consumers will ever make, after a home and a car. The FTC estimated the cost of a funeral, including burial, in 1982 averaged between two and three thousand dollars. Today, consumer organizations such as the American Association of Retired Persons estimate the average cost of a funeral at five thousand dollars. Based upon an annual death rate in the United States of approximately 1.9 million, the total amount spent by consumers on funeral and burial arrangements could be as high as 9.5 billion dollars per year. (Id.)

It is beyond question that the purchase of a funeral is an important financial transaction for consumers. Yet it is often made under circumstances which reduce the ability of consumers to make careful, informed decisions due to the pending or actual death of a family member or friend. In addition, the FTC found that consumers lacked familiarity with the funeral transaction itself: nearly fifty percent of all consumers have never arranged a funeral and another twenty-five percent have done so only once. (Id.)

Consumers must also make potentially costly decisions under severe time constraints. Within hours of death, consumers must authorize for the remains to be removed from the place of death to a funeral home and arrange for embalming. Within at most twenty-four to forty-eight hours additional decisions must be made including the purchase of a casket, the use of the funeral home facilities, burial arrangements including a vault or graveliner, or cremation, and memorialization. (Id.)

The FTC Final Staff Report on Funeral Industry Practices specifically discussed the disadvantaged state of the consumer when making at-need arrangements:

> The handicapped bargaining position of the funeral purchaser is the product of a number of different factors. The most significant of these are:
> (1) emotional trauma;
> (2) guilt;
> (3) dependency and suggestibility;
> (4) ignorance; and
> (5) time pressure. (supra at 159)

The report discussed each of these factors in depth. However, even assuming total industry compliance with the Funeral Rule, it can at best prevent or remedy only one of the five factors, ignorance. Therefore, consumers' ability to make clear and well-considered decisions regarding funeral purchases develop only when all five factors are absent, which is the essence of the preneed transaction.

III. The Characteristics of Soliciting Preneed Funeral Arrangements Enable Consumers to Make Informed Choices Including the Postponement or Cancellation of any Purchase

Industry observers have estimated that approximately thirty percent of current funerals are purchased on a preneed basis.[4] Such pre-purchased arrangements provide a number of benefits to consumers which are, by circumstances, absent from at-need purchases. As noted in a recent Commission-authorized Bureau of Competition "intervention letter,"[5] preneed selling enables consumers to shop comparatively and make purchase decisions without the time and emotional pressures associated with at-need transactions. The FTC also noted that preneed purchases allow consumers to obtain a hedge against the increasing cost of funerals by "locking in" the price of goods and services as of the time of purchase. (Id. at 2a)

In addition to the comparative leisure at which consumers may consider or reject the making of preneed arrangements, consumers benefit in other ways. Federal law[6] provides for a three-day "cooling-off" period to cancel preneed sales made in the home, and an increasing number of states are providing additional

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[4] Bureau of Consumer Protection Staff Report to the Federal Trade Commission, Mandatory Review of the Funeral Industry Practices Trade Regulation Rule (16 CFR Part 453), April 1988, at page 41, footnote 84.

[5] February 9, 1989 letter, Jeffrey I. Zuckerman, Director, Bureau of Competition, FTC, to Honorable Franklin R. Hall, Member, Virginia General Assembly House of Delegates. (Appendix at 1a)

[6] FTC, Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 CFR Part 429.

cancellation time periods of thirty days or longer. Some states, including Virginia, provide for an unlimited right to cancel preneed funeral agreements prior to the furnishing of the goods and services. Financially, preneed agreements are often paid on an installment basis ranging between thirty-six and sixty months with terms of financing regulated by the federal Truth in Lending statute.[7]

A model state statute regulating preneed funeral sales[8] has been developed and circulated by the American Association of Retired Persons (AARP) on behalf of its nearly thirty million members. Among the areas which the AARP model law seeks to regulate are refund provisions, whether the contract is a guaranteed or non-guaranteed price agreement, and the amounts to be escrowed to assure the seller's performance.

It is significant that the AARP model law contains no prohibitions on either door-to-door or telephone solicitations but sensibly provides for the seller to identify himself, his product, and make an appointment with the prospective buyers.[9] Amici contend that if the needs of consumer protection actually required

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[7] Truth in Lending Act, 15 USC § 1601, Regulation Z, 12 CFR Part 226.

[8] A Model Law for Prepaid Funeral Arrangements, developed by Consumers Affairs, Program Department, American Association of Retired Persons. (Fourth Circuit App. Tab 32 at 565)

[9] In its commentary, AARP notes "This section offers the consumer the convenience of telephone and door-to-door sales while limiting the potential for harassment. Further protection is provided by existing state and federal regulations such as the FTC Door-to-Door Sales Rule and by the cooling-off period mandated by the model act."

the complete prohibition of telephone preneed solicitation, as in the Virginia law, then the impetus would logically come from AARP and its huge constituency. Clearly the opposite is the case.

Recent surveys by AARP[10] indicate that the majority of consumers are interested in receiving prices and other information relating to funerals by telephone. For example, 57 percent of respondents in AARP's Excel survey of consumer opinion think price information should be available over the telephone.[11] This same data, according to AARP, also suggest that consumers are willing to use telephone and other price information to comparison shop. Nearly 50 percent of the respondents in the Excel survey stated that they would consider evaluating different funeral providers.[12]

Amici are unaware of the existence of any studies, surveys or other reports which indicate that consumers are opposed to receiving preneed funeral information by telephone, or believe that the industry should be singled out to prohibit the solicitation of preneed funeral arrangements by telephone. In addition, recent FTC "intervention" letters commenting

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[10] Consumer opinion surveys by Gallup and other organizations were commissioned by AARP and submitted to the FTC as part of the Commission's current Mandatory Review of the Funeral Industry Practices Trade Regulation Rule. The survey results are summarized in the Proposed Findings of Fact, Conclusions, and Recommended Decision of American Association of Retired Persons, Public Record No. 215-66, R-M-11.

[11] In the Matter of the Mandatory Review of Funeral Industry Practices Trade Regulation Rule, 16 CFR Part 453, Public Record No. 215-66, McFadden, R-HX-8 at Exhibit B, p. 16.

[12] Id. at 14.

on proposed state legislation warn that restrictions on the flow of information, including telephone and door-to-door solicitation, may make it more difficult for consumers to learn about various prices, levels of quality, and types of services available.[13]

The FTC observed that when it is more difficult for consumers to compare prices and other options, firms are protected from competition and their incentive to keep prices down and to offer alternatives is reduced. "Restrictions on solicitation may also make it more difficult for competitors, especially new market entrants or those offering innovative services, to obtain clients."[14]

IV. Purported State Interests in "Protecting" Consumers from Preneed Funeral Solicitation Result in Anti-Competitive Legislation

A. Industry Concerns Dominate State Boards and Legislatures

In conjunction with its investigation into industry practices, the FTC conducted an inquiry into state regulatory statutes and the relationship between state legislatures, governing boards and the industry. The Commission staff recognized that state corrective action of industry abuses was preferable to federal regulation since enforcement and compliance could be monitored better locally.[15] However, the FTC staff

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[13] FTC letter to Honorable Franklin P. Hall, dated February 9, 1989, supra, commenting on proposed Virginia House Bill No. 1265 which would prohibit door-to-door and telephone solicitation of preneed funeral plans (Appendix at 4a). The measure was subsequently enacted into law.

[14] Id. at 4a.

[15] FTC Bureau of Consumer Protection Staff Report, April 1988, supra, at 65-66.

found that the vast majority of state funeral regulations were concerned with technical or licensing procedures rather than substantive measures to reduce consumer abuses.[16]

Staff also observed that state licensing boards were composed almost exclusively of morticians, and that funeral director trade associations exerted an enormous influence on the boards and their activities. "Often, the associations and the state licensing authorities are indistinguishable from one another in terms of composition, positions on issues and perceptions of their responsibilities."[17]

The staff report found that the "unstartling result" of this association/state board collaboration was that the boards tended to operate as an arm of the associations, under the color of state law, and served the interests of funeral director constituents rather than as consumer protectors.[18] This finding is particularly underscored with respect to the state of Virginia by the evidence presented in Petitioners' Brief at 3 and 4.

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[16] Final Staff Report to the FTC, June 1978, supra at 102. The report continued: "Many of the regulations have been drafted and sponsored by funeral director associations and are directed toward enhancing the image of the funeral director as a professional and guardian of the health of the community. The limited substantive conduct standards that can be found in state regulations typically ignore the crucial portion of the funeral transaction when the consumer is purchasing merchandise and services from the funeral director." (Id. at 102-103, footnotes omitted).

[17] Id. at 103.

[18] Id. at 104.

Furthermore, staff reported that the protection and promotion of funeral industry interests in state regulations were carried out by well-organized and effective lobbying networks, including the employment of paid lobbyists. Various state association lobbying efforts have defeated mandatory price itemization proposals and other bills aimed at weakening the industry domination of state boards by adding consumer representation.[19]

B. Existing State Legislation Insulates Industry Members from Competition.

Examining the particular statutes and regulations in the various states, the FTC staff found that many had a common purpose of protecting industry members from competition.[20]

Rules and regulations administered by the state boards control competitive behavior including marketing techniques for preneed funerals. In addition to the anti-solicitation laws, the staff found that re-

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[19] Id. at 138-139.

[20] "It is also apparent that many restrictive state regulations operate not to provide badly-needed information or weed out the unqualified or unscrupulous, but to insulate licensed funeral directors from the pressures of competition. The laws restrict competition among funeral directors and from other entities which seek to offer funeral services and merchandise or to assist consumers in making funeral arrangements. Many of the laws create barriers to entry into the occupation and to the offering of low cost funeral services. Others, which prohibit cemetery-mortuary combinations, discourage funeral directors from cooperating with memorial societies and limit the sale of certain funeral merchandise to licensed undertakers, operate to inhibit competition and to ease forces that could exert a downward pressure on prices." (Id. at 103)

stricting the sale of funeral merchandise to licensed funeral directors severely limited preneed competition. In some states, the term "funeral merchandise" was defined so broadly that it included items normally sold by cemeteries such as burial vaults.[21]

An updated review of state regulatory statutes conducted in 1987 by the FTC staff found that relatively few states had amended their laws in the intervening years to include the various provisions of the Funeral Rule. For example, only thirteen states required funeral providers to give consumer price information over the telephone.[22]

Since 1985 the FTC staff have responded with "intervention" letters to requests by state legislators to comment on proposed industry-related bills.[23] Most of the proposals reviewed involve anti-solicitation restrictions on preneed funeral plans and the selling of funeral merchandise by only licensed funeral directors, provisions which are part of the Virginia law in the instant case. With regard to efforts prohibiting preneed door-to-door and telephone solicitation in Virginia, a recent Commission-authorized letter stated

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[21] Id. at 118-119.

[22] Bureau of Consumer Protection Staff Report, April 1988, supra, at 68-69.

[23] FTC staff have submitted such comments to Illinois State Senator Judy Baar Topinka (May 31, 1985) Fourth Circuit App. Tab 33 at 588-589; Alabama Representative Arthur Payne (January 16, 1986); Kansas State Representative Ginger Barr (February 14, 1986); the Illinois Department of Registration and Education (May 9, 1986); Oregon State Representative Chuck Sides (April 6, 1987); and Virginia House Delegate Franklin P. Hall (February 9, 1989) supra; also Congressman Steny H. Hoyer (November 23, 1988).

that such broad proscriptions, including solicitation where there is little or no risk of coercion, harassment, or similar abuses, "may unnecessarily restrict the dissemination of truthful information about and sales of preneed funeral plans to willing and competent purchasers."[24] As an alternate but less restrictive means of preventing such abuses, the FTC letter endorsed a provision in the Virginia bill, which was the subject of the letter, allowing consumers the right to cancel any preneed funeral agreement prior to the furnishing of the services or goods.[25] However, the proposed Virginia statute was subsequently enacted into law containing **both** the cancellation provision and the prohibition of telephone and door-to-door preneed solicitation.

C. The Fourth Circuit's Decision Has Caused Similar Prohibitions on Preneed Solicitation to be Introduced into Other States

The Virginia bill, H.B. 1265, as discussed above, was proposed and passed by both houses of the legislature after the federal district court in this case had upheld the constitutionality of a similar prede-

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[24] FTC letter to Honorable Franklin P. Hall, supra, at 5a.

[25] Article 5, Section 54.1-2820 (A) (7) to Chapter 28 of Title 54.1 of the Code of Virginia, as added, now states, that a preneed funeral contract must provide "that any person who makes payment under the contract may terminate the agreement at any time prior to the furnishing of the services or supplies contracted for; if the purchaser terminates the contract within thirty days of execution, the purchaser shall be refunded all consideration paid or delivered, together with any interest or income accrued thereon; if the purchaser terminates the contract after thirty days, the purchaser shall be refunded any amounts required to be deposited under § 54.1-2822, together with any interest or income accrued thereon."

cessor statute.[26] The bill was subsequently signed into law after the Fourth Circuit affirmed the decision in March 1989. Although many state legislatures were adjourned or near adjournment in the next few weeks when the decision was circulated among industry groups, similar though expanded measures were introduced into at least three state legislatures.

The Fourth Circuit limited its ruling to preneed funerals but by April 5th an Indiana Senate bill[27] was amended to prohibit both cemetery and funeral home preneed solicitation by telephone and door-to-door. Amici were informed by members in that state that both the instant case and its companion decision, *National Funeral Services, Inc. v. Rockefeller*, supra, were cited as authority to justify passage.

Also in April, a Pennsylvania House bill[28] was proposed to severely restrict the solicitation by telephone of all products and services with cemetery lots and time-share estates being singled out for specific reference. In May, a bill was introduced into the Maine House of Representatives[29] which would prohibit all forms of preneed solicitation by cemeteries. Maine already prohibits any form of preneed solicitation by funeral homes.

Amici believe that this reaction stemming from the Fourth Circuit's decision in so relatively short a time

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[26] H.B. 1265 was apparently enacted to avoid the issue of constitutional vagueness as applied to preneed sales which involved its predecessor statute, the subject of the instant case.

[27] Indiana Senate Bill 101.

[28] Pennsylvania House Bill 827.

[29] Maine House Bill 1127.

period strongly suggests that anti-solicitation proposals affecting preneed sellers of funeral homes and cemeteries will be introduced when state legislatures convene in 1990. As the FTC has cautioned, these measures are anti-competitive, anti-consumer, and serve only to protect entrenched industry interests. However, advocates of these measures can claim that the Fourth Circuit ruling supports their position.

CONCLUSION

Telemarketing is an established and widespread means for marketing legitimate services and products in the United States. It is widely used in the funeral industry in the solicitation of pre-need sales. It has been prohibited by the Virginia legislature, and as a result of the Fourth Circuit's decision similar prohibitions have been introduced into other states. This Court, in its prior decisions, has not yet considered this topic. It undoubtedly constitutes a severe restriction on the right of free commercial speech on the part of the members of a major industry to communicate information of great importance to consumers.

For these reasons, the Court is respectfully requested to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and upon review of the opinion and judgment, to reverse the judgment below and enter a judgment for Petitioners.

Respectfully submitted,

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Dated: July 28, 1989

APPENDIX

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 9, 1989

COMMISSION AUTHORIZED

The Honorable Franklin P. Hall
Member, House of Delegates
General Assembly of Virginia
Suite One, Seven Hundred Building
7th & Main Streets
Richmond, Virginia 23219

Dear Mr. Hall:

We are pleased to respond to your request for our views on House Bill No. 1265 concerning the sale of pre-need funeral arrangements.[1] You specifically requested our views about provisions of the proposed legislation that would permit only licensed Virginia funeral directors to engage in "preneed funeral planning" and that would prohibit solicitation of pre-need contracts through telemarketing. We believe that these restrictions could unnecessarily reduce competition and injure consumers.

For several years, the Commission staff has endeavored to identify restrictions within a number of professions, including the funeral services profession, that limit competition, increase costs and harm consumers without providing countervailing benefits. The Commission staff has cautioned against proposed statues and regulations in sev-

[1] These comments are the views of the staff of the Bureau of Competition of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner.

eral states that unnecessarily restrain competition and limit consumer choice in the purchase of pre-need funeral plans.[2]

Pre-need sales of funeral goods and services have been increasing throughout the country. These arrangements enable consumers to shop comparatively and make purchase decisions without the time and emotional pressures generally associated with "at-need" purchases. Pre-need purchases may also allow consumers to obtain a hedge against the increasing cost of funerals by "locking in" the price of goods and services as of the time of purchase.

Despite the benefits associated with pre-need arrangements, the Commission staff has found that many states have regulations that limit the ability of pre-need sellers to compete in the market for funeral goods and services. While states have a legitimate interest in protecting consumers from the fraudulent or deceptive practices of some pre-need plan sellers, consumers may be injured by regulations that inhibit price competition, retard innovation, or limit the availability of legitimate alternative goods and services in the funeral industry.

The Commission is concerned with restrictions that allow only licensed funeral directors to sell pre-need funeral plans, including funeral goods and arrangements for providing funeral services. Such restrictions may harm consumers by preventing the introduction and development of innovative forms of competition and lower cost alternatives for funeral products and services for which the professional expertise of a funeral director is not required. For example, consumers may be harmed if owners of cemeteries and manufacturers of funeral goods are completely prohibited from selling caskets and burial vaults to consumers

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[2] We have submitted such comments to Illinois State Senator Judy Baar Topinka (May 31, 1985); Alabama Representative Arthur Payne (January 16, 1986); Kansas State Representative Ginger Barr (February 14, 1986); the Illinois Department of Registration and Education (May 9, 1986); and Oregon State Representative Chuck Sides (April 6, 1987).

in Virginia. Similarly, consumers may be harmed if persons who might otherwise act as independent retailers or brokers of preneed funeral plans are prohibited from competing with licensed funeral directors in the sale of such plans. By dealing with more than one funeral home, a broker may be able to obtain terms more favorable to the consumer.[3]

These restrictions may also prevent funeral directors from operating more efficiently. For instance, a funeral director may wish to use employees or agents to sell preneed funeral plans. These employees or agents would not require the technical skills of funeral directing because they would not be engaged in that activity, yet the proposed legislation may prohibit them from selling such plans.[4]

The second issue you raised in your letter concerns the proposed restrictions on pre-need solicitation using the telephone. You stated that the proposed restraint on the use of telemarketing to solicit pre-need funeral business would be the first such restriction imposed on any profession in Virginia. The proposed legislation would prohibit

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[3] The Commission staff has also expressed a related concern with potentially anticompetitive certification requirements. The staff was asked to comment on an Oregon legislative proposal that persons wishing to sell pre-need funeral contracts must obtain certification from the state Mortuary and Cemetery Board. The staff noted that several members of the certifying Board would be potential competitors of the pre-need sellers seeking certification, and that the bill was unclear as to the grounds that would permit the Board to withhold certification. In such circumstances, there is some danger that the certification process may be used to hinder entry by new competitors.

[4] Generally, only licensed funeral directors are able to provide services needed for the disposition of human remains. It may therefore be desirable to ensure that measures are taken to prevent pre-need sellers who are not licensed funeral directors from misrepresenting what is included in a given pre-need plan. This should include some protection against a misrepresentation of the relationship that exists between the pre-need seller and a licensed funeral director.

all "in-person communication," which the bill defines to includes both face-to-face and telephone solicitation.

Effective communication of truthful commercial information by sellers to potential customers is critical to the functioning of competitive markets. Restrictions on the flow of information may make it more difficult for consumers to learn about the various prices, levels of quality, and types of services that are available. When it is more difficult for consumers to compare prices and other options, firms are protected from competition, and their incentive to keep prices down and to offer alternatives is reduced. Restrictions on solicitation may also make it more difficult for competitors, especially new market entrants or those offering innovative services, to obtain clients.

This is not to say that solicitation is always appropriate.[5] In certain circumstances, solicitation may be so susceptible to abuse that restrictions may be justified. In the funeral industry, for example, restrictions on solicitation in at-need situations (after death has occurred or where death is imminent) may be justified because of the substantial risk of undue influence.

Similarly, the legislature might determine that, in certain circumstances, even pre-need in-person solicitation

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[5] In its decision in American Medical Association, 94 F.T.C. 701 (1979), *aff'd*, 638 F2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided Court*, 455 U.S. 676 (1982), the Federal Trade Commission held that an AMA code of ethics provision prohibiting virtually all advertising and solicitation by physicians violated Section 5 of the Federal Trade Commission Act. The Commission found that the "AMA's broad proscription of advertising and solicitation [had], by its very essence, significant adverse effects on competition among AMA members." *Id.* at 1005. The Commission did provide in its order, however, that "in view of the potential overreaching that may occur in the absence of professional regulation," the AMA could proscribe "uninvited in-person solicitation of actual or potential patients, who, *because of their particular circumstances*, are vulnerable to undue influence." *Id.* at 1029-30 (emphasis added).

could be susceptible to coercion, harassment, or similar abuses. This does not, however, justify limitations that are more restrictive than reasonably necessary to prevent such abuses. Restrictions that prohibit all face-to-face and telephonic pre-need solicitation, including solicitation in situations where there is little or no risk of coercion, harassment, or similar abuses, may unnecessarily restrict the dissemination of truthful information about and sales of pre-need funeral plans to willing and competent purchasers.

Moreover, there may be less restrictive means of preventing such abuses. For example, the proposed bill would add Art. 5, § 54.1-2820 (A) (7) to Chapter 28 of Title 54.1 of the Code of Virginia to require that any pre-need funeral contract contain a provision allowing the consumer to "terminate the agreement at any time prior to the furnishing of the services or supplies." This requirement would afford consumers considerable protection from abusive solicitation.[6]

In addition, pre-need solicitation or sales may be subject to the requirements of the FTC's Funeral Industry Practices Rule.[7] The Funeral Rule requires that "funeral providers" give itemized price lists to consumers and prohibits misrepresentations of legal, cemetery and crematory requirements. A "funeral provider" is "any person, partnership, or corporation that sells or offers to sell funeral

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[6] Similarly, the Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429, which requires that a seller give notice of the consumer's right to rescind a sale within three business days, applies to most sales of pre-need funeral arrangements that do not occur at the seller's place of business. However, this rule does not apply to certain transactions. For instance, it does not apply to sales conducted entirely by telephone or mail, or sales made as part of an insurance contract. 16 C.F.R. Part 429.1, Note 1 (a)(4) and (a)(6) (1988).

[7] 16 C.F.R. Part 453 (1988).

goods and funeral services to the public."[8] Many sellers of pre-need funeral arrangements may not be subject to the Funeral Rule's requirements, however, either because they are not "funeral providers"—that is, they do not sell both funeral goods and funeral services—or because they are engaged in the "business of insurance."[9] Thus, permitting persons other than funeral directors to sell preneed arrangements might benefit consumers by increasing competition in that market, though it is possible that consumers would be harmed by such authorization because the Funeral Rule's provisions may not apply to all of these sellers.

For the reasons set out above, we believe that the provisions of H.B. 1265 that would permit only licensed funeral directors to engage in "preneed funeral planning" and that would prohibit solicitation of pre-need contracts through telemarketing may unnecessarily restrain competition and hinder the sales of pre-need funeral goods and services in Virginia.

We hope that our comments will be helpful to you. We appreciate the opportunity to present our views and would be happy to provide any further assistance you might request.

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[8] 16 C.F.R. § 453.1(j) (1988).

[9] The Federal Trade Commission Act, which provides the statutory authority for the Commission's trade rules, does not apply to the business of insurance to the extent that it is regulated by state law. 15 U.S.C. § 1012; 16 C.F.R. § 453.8(c) (1988). The Commission is currently reviewing the Funeral Rule and plans to decide whether to leave the rule unchanged or to amend or repeal it by October 31, 1989. 53 Fed. Reg. 19864 (May 31, 1988). If the Commission ultimately decides to amend the rule to apply to all sellers of pre-need funeral arrangements or, on the other hand, to exempt all pre-need sellers, funeral directors and others who sold pre-need arrangements would not longer be treated differently under the rule. However, sales that constitute the "business of insurance" would continue to be exempt from the Funeral Rule even if the definition of "funeral provider" were changed.

Sincerely,

Jeffrey I. Zuckerman
Director
Bureau of Competition